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REPORT

OF

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT OF ALABAMA

DURING THE

NOVEMBER TERM, 1911-12

BY

LAWRENCE H. LEE

Supreme Court Reporter

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Andalusia City Court	HON. A. L. RANKIN	Andalusia.

ERRATA.

In Richardson v. Mertins, page 309, last head note for "Section 4864" read "Section 4800."

On page 391, citation "Schuler v. Fisher, 67 Ala. 184," read, "167 Ala. 184."

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Rules 10, 11, 12 and 13, which take the place of rules of the same number as they appear in the Code of 1907.

"10. *Appellant's Briefs; How to be Prepared.*—Appellant's brief shall contain a concise statement of so much of the record as fully presents every error and exception relied on, referring to the pages of the transcript. If the insufficiency of the evidence to sustain the verdict or finding, in fact or law, is assigned, the statement shall contain a condensed recital of the evidence in narrative form so as to present the substance clearly and concisely. The statement will be taken to be accurate and sufficient for decision, unless the opposite party in his brief shall make the necessary corrections or additions.

Following this statement, the brief shall contain, under a separate heading of each error relied on, separately numbered propositions or points, stated concisely, and without argument or elaboration, together with the authorities relied on in support of them; and in citing cases, the names of parties must be given, with the book and page where reported."

"11. *Appellee's Brief.*—The brief of appellee on the assignment of errors shall point out any omissions or inaccuracies in appellant's statement of the record, and shall contain a short and clear statement of the propositions by which counsel seek to meet the alleged errors and sustain the judgment or decree, or by which such errors are obviated. Following this statement, the brief shall contain the points and authorities relied on in like manner as required in the appellant's brief. The brief of appellee on cross-errors shall be prepared in the manner required in the case of appellant's brief. The brief of appellant, in answer to the cross-assignment of errors, shall be prepared in the manner required of appellee's in answer to the assignment of errors. Reply briefs shall be prepared in like manner to answer briefs."

"12. *Succinct Statement of Points and Authorities.*—The briefs of any party may be followed by an argument in support of such briefs, which shall be distinct therefrom, but shall be bound with the same. The argument shall be confined to discussion and elaboration of the points contained in the briefs. The names of counsel shall be affixed to all briefs filed by them.

"All briefs shall be printed or typewritten in a neat and workman-like manner."

"13. *Briefs of Appellant to be Filed on Submission of Cause; Additional Briefs; Service.*—Counsel for appellant at the time of submission of any civil cause shall file his brief and arguments, printed or typewritten as now required by the rules on that subject, and place at least four copies thereof in the transcript. Upon his failure to comply with this rule, the case shall not be submitted or heard on his motion, and may be dismissed on motion of the appellee; and prior to or upon submission, appellant's counsel shall serve a copy of his brief and argument on appellee's counsel, and appellee's counsel shall be required to file his brief and argument within ten days after service upon him of brief and argument by appellant's counsel, and failing, will not be heard upon the merits of the appeal, except by consent of the court. After a cause has been

submitted or heard, no brief will be allowed to be filed or furnished except on the consent of a judge of the court upon satisfactory proof that a copy thereof has been furnished to the other side, and in such case the opposite party may reply to any new matter presented by such brief."

Rules 26 and 27 shall remain as they are as to transcripts in equity cases, but are amended as to civil and criminal cases so as to read as follows:

"26. *Mode of Preparing Transcript.*—The matter of all appeals to this court and all applications for any original process or action shall be plainly typewritten or printed.

"On the back or binding of the transcript or application shall be endorsed the style of the appeal or application; and, if an appeal, the court from which the appeal is presented. The pages of the entire transcript or application shall be numbered consecutively throughout. In the front of the first part of the transcript or application there shall be made a correct subject and page index of the entire transcript or application. At the beginning of the transcript for an appeal the following caption, and none other (except as otherwise particularly provided hereinafter), shall be written: 'At a regular, adjourned or special term of _____ Court of _____ (insert in the blanks the legal name of the court from which the appeal is prosecuted), at which the officers authorized by law to hold or serve such court were serving, the following proceedings were had in the cause styled _____ vs. _____ (insert the style of the cause as it appears on the docket of the court from which the appeal is taken.) Referring to the exception above mentioned, the order of organization of the court, or its organization as shown by the minutes thereof, shall only be set out in the transcript on an appeal when a question was made against the organization of the court to try that case or against the lawful power of the court to try that case at that term or at that time.'

"Following the caption provided, the pleadings shall be set out in the order of time of their filing. If the judgment of the court was taken upon the pleadings forming a part of the transcript *at a different time* or times from the entry of the final judgment or decree, such intermediate judgment or decree, if separately entered on the minutes, shall be set out in the transcript following the pleading inviting the judgment or decree. In copying the pleadings in the transcript, the clerk shall put, in capital letters, in the center of the page just above each pleading its nature: such as COMPLAINT: DEMURRER: PLEA: DEMURRER, AMENDMENT TO OR AMENDED COMPLAINT: AMENDMENT TO OR AMENDED PLEA. The style of the case at the head of pleadings shall not be copied in the transcript. The filing of each pleading shall be accurately indicated after each pleading by the words: 'Filed,' followed by the date of the filing, omitting the name and office of the officer filing the pleading. If the appeal is in an action *at law* and there is a bill of exceptions, the final judgment shall precede the bill of exceptions in the transcript. In copying the bill of exceptions which shall then be set in, the style of the case shall be omitted, and the bill shall be immediately preceded by the words, in capitals, BILL OF EXCEPTIONS, in the center of the page. Following the bill of exceptions in the transcript there shall be inserted, without styling of case, the prayer for the appeal (if one was filed), the bond therefor, the citation of appeal with acceptance of service or of service by the officer, the certificate of the clerk to the correctness of the trans-

script. An ample number of blank pages, at the end of the transcript, for assigning errors shall be bound with the transcript."

"27. *Matters Omitted from Transcript.*—Unless some particular question is raised in respect thereto and decided in the primary court, the transcript, whether in a civil or criminal appeal, *shall not contain* in any instance: (a) Subpoenas or summons for any witness or for any defendant where there is an appearance by such defendant; (b) Orders of continuance; (c) Commission to examine a witness or certificate of a commissioner to a deposition, or affidavit made to obtain such commission. And in criminal cases the transcript shall not contain the organization of the grand jury which found the indictment, nor the *venire*, special (in a capital case) or general, for any grand or petit jury, nor the organization of regular juries for the week or term at which the case was tried, unless some question thereon was raised before the trial court and there decided."

41. *Filing Transcript; Time.*—In all cases, either civil or criminal, of appeal to this court taken in vacation, except those subject to call during the first week of the term, and in all cases, civil or criminal, appealed during the term, unless the transcript is filed with the clerk of this court not later than the first day of the first week of the term during which the case is subject to call in this court, the appeal shall be dismissed at the cost of the appellant, unless good cause be shown to the court, by affidavit or affidavits, not later than the next Thursday, why said transcript was not filed within the time herein allowed.

42. *Certiorari to Court of Appeals.*—This Court will not, in term time, nor will the Justices thereof in vacation, receive or consider an application for the writ of certiorari, or other remedial writs, or process, for the purpose of revising or reviewing any opinion or decision of the Court of Appeals, unless it appears upon the face of the application that an application had been made to said Court of Appeals for a rehearing of the point or decision complained of, and that said application had been decided adversely to the movant, and the application to this Court must be filed with the clerk of the Supreme Court within fifteen days after the action of said Court of Appeals upon the said application for rehearing. Nor will this Court or the Justices thereof entertain, consider or issue a writ of error, as authorized by section 1 of the act of 1911, page 449, unless the same is applied for within fifteen days after the rendition by the Court of Appeals, of the judgment sought to be revised or corrected.

Rule 43. Appeals: Certificates Thereof in Civil or Criminal Cases (Criminal Cases).—When a defendant has been adjudged guilty of a criminal offense in any of the courts of the state, from which judgment an appeal lies to the Supreme Court or to the Court of Appeals; and such convict desires to take an appeal under the statute of this state to the appellate court to which an appeal may be by him taken from that judgment, he or his counsel must file with the clerk of the trial court a truly dated written statement, signed by him or his counsel for him, to the effect that he appeals from the judgment against him in the case of the state of Alabama against him, giving the style of the case on the trial court docket and its docket number thereon. Within twenty days after such statement is filed as heretofore provided, the clerk shall make out a certificate of appeal, in the form now employed in criminal cases, and also recite therein the character of the offense of which the defendant was convicted and whether or not the sentence has been sus-

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pended by the court; and immediately forward the same, by mail, to the clerk of the Supreme Court or of the Court of Appeals, of the state, to which the appeal is, under the law, returnable. Upon the receipt of such certificate the clerk of the Supreme Court or of the Court of Appeals, as the case may be, shall docket the appeal in the proper place on the trial docket.

Rule 44. Same; (Civil Cases).—When a party to a civil case has executed, had approved and filed his security for costs or an appeal bond for an appeal from a judgment or decree from which an appeal lies to the Supreme Court or to the Court of Appeals, the clerk, register, or judge of probate, of the court rendering such judgment or decree shall within twenty days after such security for costs or appeal bond is approved and filed make out a *certificate of appeal* and immediately forward the same, by mail, to the clerk of the Supreme Court or of the Court of Appeals, to which the appeal is, under the law, returnable. Upon the receipt of such certificate the clerk of the Supreme Court or of the Court of Appeals, as the case may be, shall docket the appeal in its proper place on the trial docket.

The certificate of appeal provided for and required by this rule and that just preceding (43) shall not be duplicated when the transcript is prepared, but the clerk of the appellate court shall attach the certificate he has received to the transcript when the transcript is reasonably filed in his office.

Rule 45. Reversals; New Trial; Error Without Injury.—Hereafter no judgment will be reversed or set aside, nor new trial granted by this court or by any other court of this state, in any civil or criminal case on the ground of misdirection of the jury, the giving or refusal of special charges or the improper admission or rejection of evidence, nor for error as to any matter of pleading or procedure, unless in the opinion of the court to which the appeal is taken, or application is made, after an examination of the entire cause, it should appear that the error complained of has probably injuriously affected substantial rights of the parties.

NEW CIRCUIT COURT RULES.

Existing Rule 32, found in the Code of 1907, is amended by the addition of the following thereto:

"The above shall not be so construed as to prevent an appellant from setting out enough in his bill of exceptions as may be necessary to show that the errors of which he complains were probably prejudicial."

With this exception, all the Circuit Court Rules, as appearing in said Code, are unchanged.

Rule 34. Variance; Special Objection Making Point; General Charge.—In all cases where there is a variance between the allegations and proof, and which could be cured by an amendment of the pleading, the trial court will not be put in error for admitting such proof unless there was a special objection making the point as to the variance. And the general objection that the same is illegal, irrelevant and immaterial, will not suffice. Nor will the trial court be put in error for refusing the general charge predicated upon such a variance, unless it appears from the record that the variance was brought to the attention of the said trial court by a proper objection to the evidence.

Rule 35. Failure of Proof; General Charge; Permitting Proof.—Whenever the general charge is requested, predicated upon failure of

proof as to time, venue or any other point not involving a substantive right of recovery or defense, or because of some immaterial omission in the evidence of the plaintiff or defendant, the trial court will not be put in error for refusing said charge, unless it appears upon appeal, that the point upon which it was asked was brought to the attention of the trial court before the argument of the case was concluded. The trial court must permit proof of such omission at any time before the conclusion of the argument, upon such terms as the court may prescribe, not to exceed the cost of the term and a continuance of the case, one or both.

Rule 36. Special Charges; Incorporation in Record; Duty of Clerk.—It shall be the duty of clerks of trial courts when an appeal is taken to the Supreme Court or Court of Appeals, to incorporate in some part of the transcript the special charges given for either party, unless counsel waive this requirement by written agreement, and which said agreement shall be copied in the transcript in lieu of said charges. It will be a sufficient compliance with this rule if all of said charges appear in the bill of exceptions and are disclosed by the transcript in copying said bill of exceptions. This rule shall apply to civil and criminal cases.

CASES
IN THE
SUPREME COURT OF ALABAMA

NOVEMBER TERM 1911-1912.

Parris v. The State.

Murder.

(Decided December 21, 1911. Rehearing denied February 17, 1912.
57 South. 857.)

1. *Pleading; Abatement; Form.*—A plea in abatement going to the formation of the grand jury which alleges that the trial judge did not draw the grand jury before the last term of the present term of the circuit court adjourned, was unintelligible and properly stricken.

2. *Indictment and Information; Endorsement; Form.*—Where the record showed that one R. had been appointed foreman of the grand jury, the mere fact that his name was written under instead of above the words, "Foreman of the grand jury" in the endorsement of an indictment afforded no grounds for quashing the same.

3. *Jury; Special Venire; Persons Excused from Regular Panel.*—Although two persons summoned as regular jurors were excused from serving on the regular panel, they were properly placed on the special venire served on the defendant.

4. *Witnesses; Impeachment; Testimony of Accused.*—Where a defendant testified in his own behalf he was subject to impeachment by proof that his general moral character was bad.

5. *Same; Weakening Testimony.*—Where two witnesses both detailed circumstances in regard to a killing it was permissible for the purpose of weakening their testimony to show that they were drinking shortly after the difficulty.

6. *Charge of Court; Reasonable Doubt.*—A charge asserting that while the law requires the guilt of a defendant to be proven beyond a reasonable doubt, it does not require that each fact which may aid the jury in reaching the conclusion of guilt shall be clearly proved, but that, on the whole evidence, the jury must be able to pronounce guilt beyond a reasonable doubt; and that the state is only required to prove guilt beyond a reasonable doubt; and that a doubt sufficient to acquit must be actual and substantial and

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not a mere possibility or speculation, was a proper presentation of the law of reasonable doubt.

7. *Same; Singling Out Evidence.*—Charges which single out or give particular emphasis to a portion of the evidence may be properly refused.

8. *Homicide; Evidence; Res Gestae.*—The fact that deceased was shooting craps at the house of a witness thirty minutes before the shooting in which he was killed was neither relevant nor of the res gestae.

9. *Same; Instructions; Self-Defense.*—A charge on self-defense which fails to include the fact that defendant was without fault in bringing on the difficulty, and also whether defendant's mind was impressed that he was in imminent danger, and whether he could retreat without increasing his danger, is properly refused.

10. *Charge of Court; Form.*—Charges which are elliptical, argumentative or unintelligible are properly refused.

11. *Homicide; Self-Defense.*—Charges on self-defense which ignore the duty to retreat and the imminence of danger, either real or apparent, are properly refused.

APPEAL from Fayette Circuit Court.

Heard before Hon. BERNARD HARWOOD.

Henry Parris was convicted of murder in the second degree, and he appeals. Affirmed.

The plea in abatement is based on the fact that the judge of the circuit court, whose duty it was to draw the grand jury which returned the indictment, did not draw it before the last term before the present term of the circuit court adjourned, but that the court, on about the 24th day of March, 1910, drew from the jury box of Fayette county the grand jury. The other grounds are that the judge did not draw the jury in Fayette county, Ala., but had the jury box of Fayette county, Ala., sent to Livingston, which is in Sumter county, Ala., and the judge in Sumter county drew the jury from the box and mailed or expressed them to the clerk of the circuit court of Fayette county. Motion was made to strike the names of Hardy Mitchell and Franklin Mills from the venire, because they were regularly drawn and summoned for the week in which defendant's case was set for trial, and before selecting the panel to try the cause the court excused them, and after excusing them they

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were resummoned as jurors, and placed on the venire to try the cause. The motion to quash the venire sufficiently appears from the opinion.

The following charges were given at the instance of the state: (A) "While the law requires the guilt of the accused to be proven beyond a reasonable doubt, it does not require that each fact which may aid the jury in reaching the conclusion of guilt shall be clearly proved; but, on the whole evidence, the jury must be able to pronounce guilt beyond a reasonable doubt." (B) "The state is not required to prove the defendant's guilt beyond all doubt, but beyond a reasonable doubt." (C) "The court charges the jury that a doubt, to acquit the defendant, must be actual and substantial, not mere possibility or speculation. It is not a mere possibility, or possible doubt, because everything relating to human affairs or depending upon moral evidence is open to some possible or imaginary doubt."

The following charges were refused to the defendant: (2) "If the jury believe from the evidence that the deceased stated to the defendant that 'there is an old grudge between us, and I am going to kill you,' and threw his hand to his hip pocket in such a manner as to indicate to the defendant that the deceased was attempting to draw a pistol or a weapon, and if the manner of the deceased was such as to create in the mind of defendant that he was in danger of losing his life or receiving bodily harm, then the defendant had a right to shoot in self-defense, and the law does not require him to retreat." (30) "If the jury believe from the evidence that deceased made threats against the defendant, which were not communicated to him until after the killing, and if the jury believe that the deceased said to the defendant that 'I am going to kill you,' and threw his hand to his hip pocket at the time the defendant fired the fatal shot, you can consider such threats as

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directing the nature of such threats." (31) "I charge you, gentlemen of the jury, that the rule of law governing self-defense that the defendant may and must act upon reasonable appearance of same, for the law of self-preservation would be very incomplete if the defendant, then threatened or being beaten and assailed by the deceased and other parties, was required to wait to see whether they were going to inflict great bodily harm or take his life. He may act upon a reasonable appearance of same, and defend himself, even to the taking of the life of the assailant, if he was free and without fault in bringing on the difficulty, and there was no reasonable mode of escape." (33) "If the jury believe from the evidence that the defendant was justified under all the evidence in shooting deceased while deceased was facing him, and that he was using an automatic gun which shot in rapid succession, and that some of the bullets struck the deceased in the back, this would deprive the defendant of his right to a plea of self-defense." (36) "If you believe from the evidence that the defendant was free from fault in bringing on the difficulty, and the deceased said to him, 'I am going to kill you,' and placed his right hand at or near his hip pocket, and that the manner of the deceased was such as to create in the mind of the defendant that he was in danger of losing his life or receiving very great bodily harm, then the defendant had a right to shoot in self-defense, even to taking the life of deceased, and the fact that he fired more than one shot did not deprive him of his right of self-defense." (38) "I charge you, gentlemen of the jury, that the law is a reasonable master, and has equal regard for every human life under its jurisdiction. It recognizes love of life as a natural and legitimate sentiment; and, while it cannot be molded or controlled by notions of chivalry, it permits every one who is without fault, and who has adopted every

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reasonable expedient, to avert the necessity to take the life of his assailant, rather than to lose his own. The divine law does not require us to love our neighbor better than ourselves."

MCNEIL & NESMITH, and NORMAN GUNN, for appellant. Counsel discuss assignments of error relative to the pleading and the evidence, but without citation of authority. They discuss the charges refused and insist that charge 30 should have been given, and in support thereof cite.—*Roberts v. The State*, 68 Ala. 156; *Green v. The State*, 69 Ala. 6; *Rutledge v. The State*, 88 Ala. 85; *Karr v. The State*, 100 Ala. 4; *Gunter v. The State*, 111 Ala. 23.

R. C. BRICKELL, Attorney General, and W. L. MARTIN, Assistant Attorney General, for the State. There was no error in striking the plea in abatement.—*Odom v. The State*, 55 South. 546. The motion to quash the venire was properly overruled.—Sec. 18, Acts 1909, p. 312. The defendant testified as a witness, and hence, it was proper to show his general character as affecting the credibility of his testimony.—*Ward v. The State*, 28 Ala. 53; *Mitchell v. The State*, 94 Ala. 68; *Buchanan v. The State*, 109 Ala. 710; *Fields v. The State*, 121 Ala. 16; *Mitchell v. The State*, 148 Ala. 618. Charges A, B and C given for the state are correct.—*Pitts v. The State*, 140 Ala. 70; *Jones v. The State*, 79 Ala. 23; *Owens v. The State*, 52 Ala. 400. Counsel discuss charges refused to defendant and point out defects in each, but cite no authority.

SIMPSON, J.—The appellant was convicted of the crime of murder in the second degree.

There was no error in the action of the court in sustaining the motion to strike the first plea in abatement. Said plea is unintelligible in that it states that the

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judge "did not draw the grand jury * * * before the last term of the present term of the circuit court adjourned."

In addition, section 15 of the jury act 1909 (page 310) expressly provides for drawing juries at times subsequent to the adjournment of the previous term, and section 29 (page 317) declares expressly that the provisions in regard to drawing, etc., of jurors are merely directory and that "no objection can be taken to any venire of jurors except for fraud in drawing or summoning the jurors."

The plea does not raise the point that the jury was not drawn "in the presence of the officers designated by law."—Code, § 7572.

There was no error in overruling the motion to quash the indictment. The fact that the name of M. E. Reeves appeared in the indorsement *under* the words, "foreman of grand jury," in place of *over* said words, did not affect the validity of his indorsement. The record shows that said M. E. Reeves had been by the court appointed foreman of the grand jury.

The fact that two persons summoned as regular jurors were excused from serving on the regular panel did not render the placing of their names upon the special venire illegal.

There was no error in excluding the testimony as to the deceased's shooting craps in the house of witness 30 minutes before the shooting occurred, the testimony not being relevant and not part of the res gestae.

The defendant having been placed upon the stand, and having testified as a witness, was subject to impeachment by proof of bad character, just as any other witness would be (*Mitchell v. State*, 148 Ala. 618, 42 South. 1014), consequently there was no error in allowing the witness to testify that defendant's general character was bad.

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There was no error in overruling the motion to exclude the statement by the witness Tidwell that Bud Parris and John Parris were drinking shortly after the killing, as they had both detailed circumstances in regard to the killing, and the facts mentioned were proper to be considered by the jury in determining whether said witnesses were in a condition to remember accurately what transpired.

Charges A, B, and C, given on request of the state, were properly given.—*Pitts v. State*, 140 Ala. 70, 77, 83, 37 South. 101; *Jones v. State*, 79 Ala. 23, 25; *Mose v. State*, 36 Ala. 211, 231; *Owens v. State*, 52 Ala. 400, 405.

Charge 27, requested by the defendant, was properly refused as it ignores the questions as to whether the defendant was without fault in bringing on the difficulty, also as to whether the defendant's mind was impressed that he was in imminent danger, also as to whether he could retreat without increasing his danger.

Charge 30, requested by the defendant, was properly refused. It singled out a part of the evidence, and was otherwise faulty.

Charge 31 is elliptical and argumentative, and was properly refused.

Charge 33 is unintelligible and elliptical, besides being argumentative, and was properly refused.

Charge 36 ignored the duty to retreat and also the question as to whether the defendant was, in fact, impressed that he was in imminent danger, and was properly refused.

Charge 38 is argumentative, and was properly refused.

The judgment of the court is affirmed.

Affirmed. All the Justices concur, save DOWDELL, C. J., not sitting.

[Adams v. The State.]

Adams v. The State.*Murder.*

(Decided January 1, 1912. 57 South. 591.)

1. *Charge of Court; Weight of Testimony.*—The court refused to charge that if the state witnesses had exhibited prejudice against accused and had satisfied the jury that they did not testify truly and were not worthy of belief, the jury could disregard their testimony. Held, by a divided court, that under the peculiar circumstances in this case that the charge should have been given, and that its refusal was error to reversal.

2. *Same; Reasonable Doubt.*—A charge asserting that where there is a probability of defendant's innocence, the jury should acquit him, was improperly refused.

3. *Same.*—It is proper to refuse a charge asserting that where the evidence is evenly balanced the jury should acquit the defendant.

4. *Arrest; Warrant; Authority.*—Where two officers are acting together in attempting to make an arrest, and the warrant is in the possession of one of them, it is a justification for both, and the act of one of the officers, who does not have the warrant in possession in going into the house of defendant to arrest him while the officer with the warrant stands nearby, is justified by the warrant; such officer must, however, inform accused of his authority and produce the warrant before making the arrest if the warrant is demanded. (Sec. 6268, Code 1907.)

5. *Homicide; Self-Defense; Resisting Arrest.*—A citizen may resist an unlawful arrest but may not use such force as will endanger the life of the officer.

6. *Appeal and Error; Harmless Error; Evidence.*—Where a question is asked the witness and objected to, but is not answered, the defendant has no cause of complaint.

7. *Trial; Objection to Evidence; Mode.*—Where the warrant was introduced in evidence without objection, it should have been excluded on motion if shown not to be genuine or correct, but was not subject to objection to its introduction.

(McClellan and Somerville, JJ., dissent.)

APPEAL from Montgomery City Court.

Heard before Hon. ARMSTEAD BROWN.

John Adams was convicted of murder in the first degree, and he appeals. Reversed and remanded.

[*Adams v. The State.*]

It appears from the facts in the case that Ellington and Berry, two policemen, went to the home of John Adams to arrest him on a misdemeanor charge, Ellington being armed with a warrant for his arrest; and that in attempting to make the arrest Berry was killed and Ellington wounded by Adams. The witnesses were the wife of the dead man, Ellington, who was wounded, Julius Smith, W. E. Holland, and Bellinger Cheney, most of whom were connected with the police department. The evidence was in conflict as to how the killing occurred; that for the state tending to show an outrageous killing, and that for the defendant tending to show self-defense.

The following charges were refused to the defendant: (20) "The court charges that if the state's witnesses have exhibited prejudice or anger against the defendant, and satisfied you that they have not testified truly and are not worthy of belief, and you think their testimony should be disregarded, you may disregard it altogether." (12) "The court charges that, if there is a probability of defendant's innocence, you should acquit him." (5) "The court charges that, if the officers went into Adams' house to arrest him for a misdemeanor not committed in the officers' presence, the officer not having the warrant, the officer was engaged in an unlawful act." (8) "The court charges that the citizen may oppose a forcible aggression upon him in the execution of an unlawful arrest, even to slaying the officer when the arrest cannot otherwise be prevented." (22) "The court charges that if the evidence is evenly balanced the jury should lean to the side of mercy and acquit the defendant."

JOHN S. TILLEY, for appellant. The court erred in refusing charge 12.—*Fleming v. The State*, 150 Ala. 19;

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Shaw v. The State, 125 Ala. 80; *Henderson v. The State*, 120 Ala. 360; *Bones v. The State*, 17 Ala. 138; *Simmons v. The State*, 158 Ala. 8, and cases cited. Charge 20 should have been given.—*Burkett v. The State*, 154 Ala. 19; *Hammond v. The State*, 147 Ala. 79; *Story v. The State*, 71 Ala. 336. Charge 5 should have been given.—*Knowles v. The State*, 24 Ala. 672; Sec. 6269, Code 1907. Charge 8 should have been given.—*Williams v. The State*, 44 Ala. 41; *Robertson v. The State*, 29 South. 535; *Miller v. The State*, 31 Cr. Rep. 609. Charge 22 should have been given.—*Hughes v. The State*, 117 Ala. 25. Counsel discuss objections to evidence but without further citation of authority.

R. C. BRICKELL, Attorney General, and W. L. MARTIN, Assistant Attorney General, for the State. Questions not answered cannot be made the basis of a complaint.—*Jackson v. Clopton*, 66 Ala. 29; *Billingsley v. The State*, 85 Ala. 323; *Cartledge v. The State*, 132 Ala. 17; *Harris v. Basden*, 162 Ala. 367. Where two officers are acting in concert in the execution of a warrant, they are each protected by the same.—*Brown v. The State*, 109 Ala. 70; *Spear v. The State*, 120 Ala. 351; *Ward v. Deadman*, 124 Ala. 288. This is true even if one was a special deputy.—*Andrews v. The State*, 78 Ala. 483; *Parrish v. The State*, 130 Ala. 92. A reasonable doubt sufficient to cause an acquittal must grow out of the evidence.—*Rogers v. The State*, 117 Ala. 13; *Williams v. The State*, 129 Ala. 659; see also in this connection.—*Heard v. The State*, 94 Ala. 100; *Davidson v. The State*, 167 Ala. 68; *Welch v. The State*, 156 Ala. 112; *Liner v. The State*, 124 Ala. 1. Charge 20 was properly refused.—*Hammond v. The State*, 147 Ala. 79; *Burkett v. The State*, 154 Ala. 19; *Wright v. The State*, 156 Ala. 108.

[*Adams v. The State.*]

ANDERSON, J.—Charge 20, refused the defendant, is predicated upon an elementary rule of law, and the refusal of such a charge has been frequently held to be reversible error.—*Burkett v. State*, 154 Ala. 19, 45 South. 682; *Hammond v. State*, 147 Ala. 79, 41 South. 761. It is true the refusal of a similar charge in the case of *Wright v. State*, 156 Ala. 108, 47 South. 201, was justified, because abstract. We cannot say, however, that the charge is abstract in the case at bar, as the relationship and association of the deceased with many of the state's witnesses could afford an inference for the jury that the said witnesses were hostile to the defendant. Moreover, the principal witness, Ellington, was engaged in the combat, and was shot by the defendant at the same time that Berry was killed.

Charge 12, refused the defendant, has repeatedly received the approval of this court, and its refusal has often been pronounced reversible error.—*Fleming v. State*, 150 Ala. 19, 43 South. 219; *Bones v. State*, 117 Ala. 138, 23 South. 138; *Whitaker v. State*, 106 Ala. 30, 17 South. 456; *Croft v. State*, 95 Ala. 3, 10 South. 517; *Bain v. State*, 74 Ala. 38; *Shaw v. State*, 125 Ala. 80, 28 South. 390; *Henderson v. State*, 120 Ala. 360, 25 South. 236; *Prince v. State*, 100 Ala. 144, 14 South. 409, 46 Am. St. Rep. 28; *Nordan v. State*, 143 Ala. 13, 39 South. 406.

It may be conceded that the arrest in question, the defendant having been charged only with a misdemeanor or not committed within the presence of the officer, could only have been lawfully made under a warrant (section 6269 of the Code of 1907); yet the state's proof shows that Ellington did have a warrant, and the deceased, Berry, was sent to help arrest the defendant, and was acting in concert with Ellington when he went to the house to arrest the defendant. Where two offi-

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cers are acting together, the possession of the warrant by one is sufficient justification for both.—*People v. Durfee*, 62 Mich. 487, 29 N. W. 19. Berry was not, therefore, engaged in an unlawful act in going into the house of Adams to arrest him, although he did not have the warrant on his person; it being held by Ellington, who was near by. It was his duty, however, under section 6268 of the Code, to inform the defendant of his authority; and if the warrant was demanded or required he should not have made the arrest until the warrant was produced. Charge 5, requested by the defendant, was properly refused. If not otherwise bad, it was calculated to mislead the jury to the belief that Berry had no right to act under a warrant held by Ellington.

There was no error in refusing charge 8, requested by the defendant. If not otherwise bad, it was calculated to mislead the jury into the belief that the defendant would have the right to kill the officer while making a forcible arrest under an unlawful warrant, regardless of the amount of force used to accomplish said arrest. The citizen may resist an attempt to arrest him which is simply illegal, to a limited extent, not involving any serious injury to the officer. He is not authorized to slay the officer, except in self-defense; that is, when the force used against him is felonious, as distinguished from forcible. It is better to submit to an unlawful arrest, though made with force, but not with such force as to endanger the life or limb, than to slay the officer.

There was no error in refusing charge 22, requested by the defendant.—*Hill v. State*, 156 Ala. 3, 46 South. 864; *Kirby v. State*, 151 Ala. 66, 44 South. 38.

The appellant can take nothing by the objection to the question asked Ellington as to the position of the deceased when shot, as the record shows that said question was not answered.

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There was no error in permitting the state to show that Berry went with Ellington to help make the arrest, and that Ellington had a warrant; for, as heretofore stated, if they were acting in concert, the warrant was a protection to both of them.

The warrant had been introduced in evidence without objection from defendant, and an objection to the introduction of same after it had already been introduced was not proper or appropriate. If the cross-examination disclosed that it was not correct or genuine, it should have been eradicated by motion to exclude, and not by objecting to same after it had previously been introduced. We do not wish to be understood, however, as holding that the cross-examination of Williamson discredited the warrant, so as to authorize the exclusion of same.

While we have discussed only the questions argued, the other rulings have been considered, and we find no reversible errors, other than the ones previously suggested.

The judgment of the city court is reversed, and the cause is remanded.

Reversed and remanded.

SIMPSON and MAYFIELD, JJ., concur in the opinion. SAYRE, J., concurs in the opinion and in the reversal of the case, but thinks that charge 20, while correct, was abstract in the present case, and that the refusal of same was not reversible error. McCLELLAN and SOMERVILLE, JJ., think that the case should be affirmed, and therefore dissent.

Justices McCLELLAN and SOMERVILLE are of the opinion that the trial court did not commit reversible error in refusing special charges 12 and 20. That numbered 20 obviously referred, by the employment, in its hypoth-

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esis, of the term "exhibited," to manifestations of "prejudice or anger against the defendant" by witnesses while before the jury on the trial. There is not a line in the bill of exceptions to justify that feature of the hypothesis of charge 20. It was therefore abstract, and properly refused, as was expressly ruled in *Wright's Case*, 156 Ala. 108, 47 South. 201.

In several clearly expressed special charges, given at the instance of the defendant, the jury were advised that they could not convict the defendant, unless they were convinced of his guilt beyond a reasonable doubt and to a moral certainty. It has been often ruled here "that a probability of innocence is the equivalent of a reasonable doubt of guilt."—*Sanders v. Davis*, 153 Ala. 375, 385, 44 South. 979; *Bones v. State*, 117 Ala. 134, 139, 23 South. 138; *Whitaker v. State*, 106 Ala. 30, 35, 17 South. 456, and other authorities therein cited. *Reasonable doubt and probability of innocence* (the latter occurring in charge 12), both having reference to the state and degree of assurance requisite to justify a conviction of an accused, being, in law, equivalent, the court was not obliged to reiterate, in *merely different language*, the same idea it had expressed, at defendant's instance, to the jury; and hence the court committed no prejudicial error in refusing charge 12. This court has heretofore approved charge 12; but it has not heretofore taken account of the fact, present on this appeal, that the court, in other special charges given for the defendant, instructed the jury with respect to the approved equivalent of the very essence of charge 12. As they view the matter, any other conclusion would jeopardize solemn judgments by a mere play upon words.

Aside from this, however—*independent of it*—they are convinced from the record that the verdict of the jury would not have been different, had special charge

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12 been given to the jury, instead of refused. Being so convinced, they conceive it to be their duty to apply in this case, as the court did in *Pope v. State*, 174 Ala. 63, 57 South. 245, the first rule expressed in this provision of the statute (Code, § 6264), "But the judgment of conviction must not be reversed because of error in the record, when the court is satisfied that no injury resulted therefrom to the defendant," and as interpreted in *Dennis' Case*, 118 Ala. 72, 79, 23 South. 1002, 1004, as follows: "We are of the opinion the proper construction of this section of the Code is that the court must be satisfied that the verdict of the jury would not have been different if the charge had been given." They therefore think the judgment and sentence of law pronounced in the city court should be affirmed.

Roberson v. The State.

Murder.

(Decided February 8, 1912. 57 South. 829.)

1. *Homicide; Verdict; Finding Degree.*—A conviction for murder cannot stand unless the verdict expressly finds the degree of the crime of murder. (Sec. 7087, Code 1907.) This is not necessary where the conviction is of manslaughter.

2. *Same; Instructions; Self-Defense.*—Instructions on self-defense not hypothecated on an honest and reasonable belief of imminent danger and the necessity to kill, held by accused, are properly refused.

3. *Witnesses; Opinion; Character of Decedent.*—A witness is entitled to give his opinion of the character of a decedent in his own language, especially where it appeared to be based in part upon the estimate of such character in decedent's neighborhood; and hence, was entitled to state that decedent was of a violent character, although he had never heard anyone else expressly state that such was his character.

4. *Charge of Court; Reasonable Doubt.*—A charge asserting that if one single fact was proved to the satisfaction of the jury, which is inconsistent with the guilt of defendant, it is sufficient to raise a reasonable doubt requiring acquittal should have been given.

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5. Home; Undue Prominence.—A charge asserting that the jury should consider that defendant was interested in the result and that if he was convicted, he would be punished, singled out for comment a particular matter affecting the credibility of the defendant as a witness, and was improper.

6. Appeal and Error; Transcript.—It is suggested by the court that red ink should not be used in the preparation of transcript although it may be said to have a certain element of barbaric beauty and notwithstanding the transcript is prepared in a murder case.

APPEAL from Marion Circuit Court.

Heard before Hon. C. P. ALMON.

Bart Roberson was convicted of murder, and he appeals. Reversed and remanded.

The rulings as to the evidence sufficiently appear from the opinion of the court.

The following charges were refused to the defendant: (C) "I charge you, gentlemen of the jury, that if there is one single fact proved to the satisfaction of the jury which is inconsistent with defendant's guilt, this is sufficient to raise a reasonable doubt, and the jury should acquit." (7) "If the defendant was without fault in bringing on the difficulty, and was in imminent peril, or reasonably appeared to be, of loss of life, or of suffering great bodily harm, and if he could not retreat and avoid the combat in safety to himself, then he had the right to defend himself against an attack made on him by the deceased, even to the taking of his life, if it reasonably appeared to the defendant under all the circumstances to be necessary." (F) "The court charges the jury that if the defendant was without fault in bringing on the difficulty, and if at the time of the homicide there appeared, so apparently as to lead a reasonable man to the belief that it actually existed, a present, impending, and imperious necessity in order to save his own life, or in order to save himself from fatal bodily harm, to kill the deceased, then he had a right to shoot the deceased, and the jury must acquit him, on the grounds of self-defense."

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In his oral charge to the jury the court said: "The defendant was examined in his own behalf. You should weigh and pass on his evidence, as you do that of the other witnesses in the case; but in so doing you should take into consideration that he is the defendant, and interested in the result of the case; that if he is convicted he will suffer the punishment fixed by the jury, and if he is acquitted he goes free, and has no punishment to suffer."

E. B. & K. V. FITE, and A. H. CARMICHAEL, for appellant. The court should have quashed the venire on motion.—*Jackson v. The State*, 55 South. 118; Sec. 32, Acts 1909, p. 319. The court erred in permitting the witness to state that Bart Roberson tried to get him to kill his father and gave him some whisky. Counsel discuss other errors relative to evidence, but without citation of authority. The court erred in its oral charge relative to the consideration of the defendant's testimony.—*Tucker v. The State*, 161 Ala. 1; *Mills v. The State*, 55 South. 331; *Gainor v. L. & N.*, 136 Ala. 244. Counsel discuss other portions of the court's oral charge, but without further citation of authority. Charge G should have been given.—*Gaston v. The State*, 161 Ala. 37. Charge J should have been given.—*Leonard v. The State*, 150 Ala. 89; *Hale v. The State*, 122 Ala. 89. *Hale v. The State*, 122 Ala. 89. Charge F should have been given.—*Gaston v. The State, supra*; *Watkins v. The State*, 133 Ala. 88. Charge C should have been given.—*Simmons v. The State*, 158 Ala. 8; *Walker v. The State*, 153 Ala. 31.

R. C. BRICKELL, Attorney General, and W. L. MARTIN, Assistant Attorney General, for the State.

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SAYRE, J.—Appellant was indicted for murder in the first degree. The jury returned a verdict in the following form: “We, the jury, find the defendant guilty as charged in the indictment, and fix his punishment at imprisonment in the state’s penitentiary for life.” For many years the law has required of this court in the consideration of criminal appeals that it “must consider all questions apparent on the record or reserved by bill of exceptions, and must render such judgment as the law demands.”—Code, § 6264. For many years, also, the statute of this state has required that, “when the jury find the defendant guilty under an indictment for murder, they must ascertain, by their verdict, whether it is murder in the first or second degree.”—Code, § 7087. And the further provision is that, “if the defendant on arraignment confesses his guilt, the court must proceed to determine the degree of the crime, by the verdict of a jury, upon an examination of the testimony, and pass sentence accordingly.”—Ib. The reason for this is found in the fact that the statute, for the purpose of adjusting the punishment, makes murders at the common law of a certain class, murders in the first degree, and all others murders in the second degree, affixing different punishments to the different degrees.—*Watkins v. State*, 133 Ala. 88, 32 South. 627. And this court, in the observance of these statutory requirements, has frequently and uniformly held that no judgment of conviction, under an indictment for murder, can be sustained, unless the verdict of the jury expressly finds the degree of the crime of which the defendant is convicted.—*Storey v. State*, 71 Ala. 329, and cases there cited; *Fuller v. State*, 110 Ala. 655, 20 South. 1020. But where the conviction is of manslaughter the statute makes no such requirement.—*Watkins v. State*, *supra*. The trial court clearly and correctly stated this law to the jury in its charge, but must have

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overlooked it when receiving the verdict. Under the statute and the decisions the judgment of conviction in this case is fatally defective and must be reversed.

It having become proper under the circumstances of the case to prove the character of the deceased for peace and quiet or for turbulence and violence, Kite Scott, a witness for the defendant, after he had testified that he had lived for a number of years in the same neighborhood with deceased, that he knew the character of the deceased, and that his character was that of a violent, turbulent man, when drinking, on cross-examination, in answer to the solicitor's question, "Who did you hear say that": "I don't know as any one ever said them very words. He was suffered to be. I called him that kind of a man. I didn't know what they called him." Further, he said that he was not basing his judgment on what people said. Thereupon, on motion of the solicitor, the court excluded all the witness had said relative to the character of deceased, and to this action of the court there was exception. The defendant was entitled to the benefit of the witness' opinion as to the character of deceased. One may form a valuable opinion of the character of another without hearing any specific discussion or mention of that character.—*Hadjo v. Good-en*, 13 Ala. 718; *Dave v. State*, 22 Ala. 23. We learn a man's general reputation and character from the bearing of his neighbors and acquaintances towards him. Their attitude unconsciously reflects their opinion, though nothing be said. To this, in forming a competent opinion as to character, a witness may add his own knowledge. In this case the opinion of the witness appears to have been based in part at least upon the estimate of the neighbors of deceased, and should have gone to the jury. There were, however, a number of witnesses who testified to the violent and turbulent character of the deceased, when drinking; indeed, that ques-

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tion was not contested in the evidence, and it may be that on the state of the record thus shown we would not consider the particular bit of evidence in question of such importance as that error in its rejection, standing alone, would require a reversal.

The court erred in refusing charge C requested by defendant. This court has held that the charge ought to be given.—*Simmons v. State*, 158 Ala. 8, 48 South. 606; *Walker v. State*, 153 Ala. 31, 45 South. 640.

Charges 7 and F were properly refused because they omitted the postulate, necessary to an acquittal on the ground of self-defense, that the belief of imminent danger and necessity to kill must be honestly entertained by the defendant, as well as be reasonable.—*Griffin v. State*, 165 Ala. 29, 50 South. 962. “The law requires that such belief must be reasonable and honestly entertained.”—*Jackson v. State*, 78 Ala. 471, *Gaston v. State*, 161 Ala. 37, 49 South. 876, wherein it differs, is not to be followed. The charge of somewhat similar import, condemned in *Watkins v. State, supra*, was open to more than one objection. The court, having stated one sufficient objection, did not think it worth while to state others.

As to that part of the court’s oral charge which singled out for comment defendant’s interest in the result of the prosecution as affecting his credibility, see *Tucker v. State*, 167 Ala. 1, 52 South. 464.

This transcript of 67 pages is lettered throughout in red ink. It may be considered to have a certain element of barbaric beauty in it; but to the judicial eye it is distasteful and disconcerting, if not positively harmful. We would suggest that the taste for bright color be not indulged in the preparation of transcripts to be studied in this court.

Reversed and remanded. All the Justices concur.

[McSwean v. The State.]

McSwean v. The State.*Carnal Knowledge.*

(Decided February 8, 1912. 57 South. 732.)

1. *Criminal Law; Judgment; Capital Case; Waiver; Special Venire.*—A failure to record a waiver of a special venire in a capital case does not invalidate a conviction, as such waiver may be shown by the bench notes made by the trial judge. (Sec. 7264, Code 1907.)

2. *Same; Service of Indictment.*—Where a special venire and its service has been waived by a defendant, it is not necessary that a copy of the indictment should be served upon the defendant.

3. *Same; Presence of Accused; Presumption.*—Where trial was begun and verdict rendered on the same day a recital in the judgment entry showing accused's presence when the trial began created a presumption that he was continuously present and was present when the verdict was received.

Dowdell, C. J., Mayfield and Sayre, JJ., dissent.

APPEAL from Coffee Circuit Court.**Heard before Hon. H. A. PEARCE.**

Henry McSwean was convicted of a capital offense, and he appeals. Affirmed.

J. A. CARNLEY, for appellant. The judgment should affirmatively show an order requiring a copy of the indictment against the defendant to be served upon him one day at least before the day set for his trial.—Sec. 7840, Code 1907; *Lomineck v. The State* 39 South. 676. This is mandatory.—*Spicer's Case*, 69 Ala. 159; *Green v. The State*, 160 Ala. 1. The judgment should also affirmatively show the presence of defendant when the verdict was announced.—*Hayes v. The State*, 107 Ala. 1; *Wells v. The State*, 147 Ala. 142; *Cook v. The State*, 6 Ala. 39. The judgment should affirmatively show the service of a special venire upon defendant.—Sec. 7263, Code 1907; *Howard v. The State*, 160 Ala. 6; Sec. 32, Acts 1909, p. 318. The memorandum made by the judge

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in his bench notes is no part of the record and can have no effect.—*Winn v. McCraney*, 156 Ala. 630; *Brightman v. Merriwether*, 121 Ala. 602; *Park v. Lide*, 90 Ala. 248.

R. C. BRICKELL, Attorney General, and W. L. MARTIN, Assistant Attorney General, for the State. Original papers are admissible where the final record has not been made up.—*Buffington v. Cook*, 39 Ala. 64; *Wharton v. Thomason*, 78 Ala. 445; *Duncan v. Freeman*, 109 Ala. 185. The bench notes are such papers.—82 Am. Dec. 172. All such orders are considered as emanating from the court, import absolute verity and estop the parties from disputing their correctness.—*Deslonde v. Darrington*, 29 Ala. 92; *Keith v. Cliatt*, 59 Ala. 408; *Gray v. The State*, 63 Ala. 66. No injury is shown to have resulted to defendant.—*VanDyke v. The State*, 22 Ala. 57; *Curtis v. Gaines*, 46 Ala. 455; *Ex parte Cressicell*, 60 Ala. 378; *Buchanan v. Thompson*. 70 Ala. 401. It is only necessary to show a compliance with the statute or that it had been waived.—Sec. 7263, Code 1907; *Burton v. The State*, 115 Ala. 1; *Parnell v. The State*, 129 Ala. 6. The judgment entry sufficiently showed the presence of the defendant, at least enough to raise the presumption of his continuous presence.—*Snow v. The State*, 58 Ala. 372; *Diggs v. The State*, 77 Ala. 70; *Dir v. The State*, 147 Ala. 70. The defendant could waive and did waive a special venire, and it was not necessary that the special venire or copy of the indictment be served upon the defendant.—*Williams v. The State*, 81 Ala. 1; *Driskill v. The State*, 45 Ala. 21; *Wade v. The State*, 50 Ala. 164; *Tidwell v. The State*, 70 Ala. 33; *Ezzell v. The State*, 54 Ala. 165; *Smith v. The State*, 145 Ala. 17; *Wilson v. The State*, 128 Ala. 17; *Thomas v. The State*, 94 Ala. 74. Counsel cite authorities from other jurisdictions showing the effect of a waiver of statutory requirements.

[McSwean v. The State.]

McCLELLAN, J.—The defendant was convicted of carnally knowing or abusing in the attempt to carnally know a girl under the age of 12 years; and the penalty imposed was 50 years imprisonment.

The judgment entry reads: "This the 30th day of March, 1910, came Claud Riley, special solicitor, who prosecutes for the state of Alabama, and also came the defendant in his own proper person and by attorney, and the said defendant, being duly arraigned upon said indictment, for his plea thereto says not guilty, thereupon came a jury of twelve good and lawful men, to wit, L. M. Bowden, and eleven others, who, being impaneled and sworn, according to law, upon their oaths do say, 'We, the jury, find the defendant guilty and fix his punishment in the penitentiary for fifty (50) years.' " The trial was had and concluded on the day upon which it was set, viz., March 30, 1910; and on that date sentence, conforming to the verdict, was imposed.

In response to certiorari the clerk certifies as follows: " * * * That I find on the trial docket the following bench notes, made in said cause, to wit: 'March 25, 1910, Deft. in open court in person and with his attorney being duly arraigned, pleads not guilty, and his case is set for trial on Wednesday, March 30, 1910, and the defendant in open court and in writing waives special venire for his trial. Written waiver on file.' 'March 30, 1910. J. & V. Guilty and punishment fixed at 50 years imprisonment in the penitentiary.' 'Deft. is sen. to imp. in pen. for 50 years.' I further certify that the above bench notes is all that appears upon the record and proceedings in said cause, and that I do not find any agreement on file waiving special venire."

The crime charged being punishable capitally, the procedure requisite in such cases should, unless waived, have been observed in the trial of this defendant.—

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Code, § 7264, provides: "At any time before a special venire has been drawn for the trial of any capital case, if the defendant enters a plea of guilty or in writing waives the right of a special venire, such plea of guilty or such waiver of special venire shall be entered of record, and, in either event, no special jury or venire shall be necessary for the trial of such case; but the trial of the cause shall be had and the question of the degree of guilt must be ascertained and the punishment fixed by a jury to be selected from the panel of regular petit jurors organized by the court during the week such case is set for trial, in the same manner as juries are organized for the trial of felonies not capital; and the state and the defendant shall be allowed the same number of peremptory challenges as they are respectively allowed in the trial of felonies not capital." Had the statute been complied with, the written waiver would have been entered of record. However important the observance of that feature of the statute may be, it is, when observed, but a ministerial act of the clerk of the court. Its office is to preserve a memorial of the fact that the prisoner, capitally charged, has waived the special venire which the law provides. If the waiver has been filed, the omission of the clerk to comply with this ministerial requirement of the statute cannot in the very nature of the thing avail the prisoner to avoid the penalty the law imposes. It bears no relation to the inquiry of his guilt or innocence. He is not prejudiced by the failure of the clerk to record the evidence of his own act, namely, his waiver of a special venire. No judicial action, with respect to the waiver contemplated, is required by the statute. The court cannot deny the effect of the waiver, as presented, when the prisoner presents it. The court is as powerless in that case as when the prisoner pleads guilty, the other act of the prisoner,

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specified in the statute, whereby the provisions of law for special venire are rendered inapplicable, unobligatory in any degree. Hence it is the act of the prisoner capitally charged in waiving the special venire, which is his due, and not that of the court, thus distinguishing that line of decisions in which it is held that bench notes are simply directions to the clerk what judgments and orders should be entered in expression of judicial action of the court, viz.: *Wynn v. McCraney*, 156 Ala. 630, 46 South. 854; *Condon v. Enger & Co.*, 113 Ala. 233, 21 South. 227; *Morgan v. Flexner*, 105 Ala. 356, 16 South. 716; *Baker v. Swift*, 87 Ala. 530, 6 South. 153; *Park v. Lide*, 90 Ala. 246, 7 South. 805; *Brightman v. Meriwether*, 121 Ala. 602, 25 South. 994.

In this instance the fact and form of the waiver appears alone in the bench notes on the trial docket of the court trying this cause. It is urged, in effect, that the bench notes cannot serve the purpose to show a waiver in the premises, in consequence of which the necessity for the special procedure prescribed for capital cases was avoided. To sanction this contention is to ignore the bench notes, is to deny those memoranda any effect whatsoever, and so upon a matter the verity of which the defendant has not disputed and does not dispute or question in any way. Mindful of the purpose and provisions of the statute providing for the waiver, taking into account the confirmatory fact that no objection to being tried without a special venire appears to have been interposed in the court below by the prisoner, and this while represented by skilled counsel, observing the statute impelled duty of the court to pretermit the special venire when the prisoner has waived it, it is clear that the affirmation of fact made in the bench notes cannot be ignored, cannot be disregarded. Their recitals are at least *prima facie* true—*prima facie* correct. In

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determining the propriety and validity of amendments nunc pro tunc, such a memorandum has from an early day in our jurisprudence been treated and regarded as, at least, quasi record.—*Harris v. Bradford*, 4 Ala. 214, 221; *Glass v. Glass*, 24 Ala. 468. Such dignity has been accorded that character of memoranda in our judicial processes as that beyond the term in which made final permanent records of causes have been conformed thereby and thereunto. So a discontinuance of a cause has been avoided in consequence of amendment nunc pro tunc supported by such memoranda.—*Yonge v. Broxson*, 23 Ala. 684. And we know, as from common knowledge, that in the actual, final transcription of the minutes of the courts, expressing the rulings upon the pleadings especially, the clerical officers thereof avail, of necessity, of the memoranda—the bench notes. Naturally so, since amendment nunc pro tunc finds its first aid in essential requisite in such quasi records set down by the judge. Accordingly, the fact is shown *prima facie* that the defendant waived a special venire for his trial.

Did this waiver carry with it the avoidance of the requirement that an order of the court for the service of a copy of the indictment should enter in capital cases, presents the second and major question discussed by counsel. The appellant was tried when the jury law of 1909 (Acts Sp. Sess. 1909, pp. 305, 318, 399) was in force. In section 32 thereof provision was made for special venires in capital cases. It did not repeal the waiver statute before quoted. A pertinent part of that section (32) reads: "Whenever any person or persons stand indicted for a capital felony, the court must on the first day of the term, or as soon as practicable thereafter, make an order commanding the sheriff to summon not less than fifty nor more than one hundred per-

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sons including those drawn and summoned on the regular juries for the week set for the trial of the case, and shall then in open court draw from the jury box the number of names required with the regular jurors drawn and summoned for the week set for the trial to make the number named in the order, and shall cause an order to be issued to the sheriff to summon all persons therein named to appear in court on the day set for trial of the defendant and must cause a list of the names of all the jurors summoned for the week in which the trial is set, and those drawn as provided in this section, together with a copy of the indictment, to be forthwith served on the defendant by the sheriff, and the defendant shall not be entitled to any other or further notice of the jurors summoned or drawn for his trial nor of the charge or indictment upon which he is to be tried." It readily appears from the special venire feature of the jury law of 1909 that it superseded all other statutes and enactments touching the service of a copy of the indictment on the prisoner. It is apparent that, as provided for in the jury law of 1909, the requirement that the court cause the service of a copy of the indictment on the prisoner is but and only a part of the system prescribed for a special venire—a requirement that is simply and only a spoke in the wheel of the special venire. It is not an independent, distinct, prescription of the law, as now written. Indeed, the term "together" emphasizes the dependence, in contemplation of the lawmakers, of the provision for a copy of the indictment upon that for a copy of the special venire. A different conclusion prevailed here under other statutes, affirming as distinct, independent provisions, disassociated from the detailed provisions now of force with respect to special venires.—See *Spicer's Case*, 69 Ala. 159, among others cited on brief for appellant. Under the

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jury law of 1909 the omission to "cause" a copy of the indictment served upon the defendant was not error in any degree, for it was waived when the special venire was waived. Having so waived the legal requirement for the special venire, all incidental prescriptions of the law were likewise rendered unobligatory. His trial was, then, to proceed as in felony cases, not capital.—Code, § 7264.

There is no merit in the suggestion that error must be predicated on the silence of the judgment entry to show the prisoner's presence when the verdict was received. The trial having been begun and concluded and the sentence imposed during the same day, and it appearing from the judgment entry that the defendant was present in the inception of the trial and when the sentence was imposed, it will be presumed that he was present continuously.—*Dix's Case*, 147 Ala. 70, 76, 41 South. 924, and authorities therein cited.

No error being shown, the judgment is affirmed.

Affirmed.

SIMPSON, ANDERSON, and SOMERVILLE, JJ., concur.
DOWDELL, C. J., and MAYFIELD and SAYRE, JJ., dissent.

MAYFIELD, J.—(dissenting.)—But for the decision in this case, I would have thought there was no doubt that a judgment of conviction and sentence in a capital case could not be supported on appeal, unless the record proper showed an order of the court, setting the day for trial and directing a special venire for the trial, or a waiver thereof, made in the mode prescribed in the mandatory statutes on the subject. There are scores, if not hundreds, of cases holding to this effect, and none to the contrary except this one. This is certainly a radical departure from all former decisions of

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this court upon this subject; and there are many of them which this, in effect, overrules. Heretofore, without exception, this has been said to be as necessary a part of the record, to support a conviction, in a capital case, as the indictment, the verdict, or the judgment. It has been repeatedly held that no one of these can be omitted from the record proper without working a reversal. One is no more important than the other. If one can be omitted, then all can be omitted, provided they are shown by parol or the bench notes.

The mandatory statutes require, and the Constitution guarantees, not that these requisites shall exist, but that they shall appear of record proper, and not otherwise. It is therefore just as necessary that these matters appear of record proper, as it is that they exist. They are not matters that can be waived, except those provided for in the statute, and then only in the mode prescribed by the statute, which is that the waiver must be in writing and appear of record proper. These matters of record cannot be dispensed with—not even at the direct request of the accused. He cannot consent to the omission of any of these requisites from the record in a capital case, so as to cure the error. A man cannot legally consent to be tried for a capital offense without an indictment; nor to be convicted without the verdict of a jury required by law; nor to be executed without a judgment and sentence of the law authorizing such execution. These requisites are not subjects of waiver, nor of control by consent or agreement.

The majority in this case have treated a solemn judgment and record of a court authorized to inflict capital punishment as a mere ministerial act of a judicial or clerical officer of the court. If the defects in this record were mere clerical omissions or misprisions, I would readily agree with the majority; but they are not

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such errors. They concern matters of record proper, without which there can be no valid judgment or sentence, matters which absolutely admit of no waiver, consent, or substitution, matters the sine qua non of a valid judgment of conviction or sentence in a capital case. It has been repeatedly asserted by this court that these requisites in capital cases are of prime importance to a prisoner in securing his constitutional guaranty that "the right of trial by jury shall remain inviolate." The acts complained of in such cases are acts of the court, not those of the judge or the clerk, and for this reason they have always by all English and American courts been considered parts of the record essential to support the judgments of conviction in such cases, and they must always affirmatively appear from the record itself—not from the bill of exceptions, the bench notes, or memoranda—to have been performed by the court. The forms and the substance of the records in capital cases are thus deeply imbedded in the foundations of our law; and, as has been well said by this and other courts, they ought not to be disregarded, certainly not when the liberty or even the life of the citizen depends upon such record.

As to these matters, it has been uniformly ruled (without a solitary exception, so far as I know) by this court that a prisoner charged with a capital offense who proceeds to trial without objection as to these acts which are required to be performed by the court, and which are required to be made a part of the record, in order to support a judgment of conviction and sentence, does not thereby waive his right to insist upon such defect in the appellate court, although no objection was made and no question raised as to such matters in the lower court. As was said by this court (*Spicer's Case*, 69 Ala. 163), by Somerville, J.: "Unless the proper order had

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been made [referring to the order setting a day for the trial, and directing a special venire], no fair field for the exercise of an untrammeled option could be presented. We cannot judicially know that a trial was not the sole alternative to continued incarceration." It was first said by Gipson, C. J., and has often been repeated by this court, in speaking of the necessity of an order setting the day for trial and for a special venire in capital cases, that these forms of records are deeply seated in the very foundations of the law, and, as they conduce to safety and certainty, they surely ought not to be disregarded when the liberty or the life of a human being is at stake. The record in a capital case like this is constituted of the proper and legitimate elements set down in their proper order—elements by the Constitution and the statutes made requisite to support a judgment of conviction and sentence.

As was said by this eminent Chief Justice (*Hamilton v. Com.*, 16 Pa. 133, 55 Am. Dec. 485): "For it is certainly not the law that all the gossip a clerk or prothonotary writes down on his docket ipso facto becomes the very voice of undeniable truth. The judges of a court of error must determine for themselves, and consequently on facts, instead of sweeping assertions." In speaking of the insufficiency of the record proper in that case, which was attempted to be supplemented by memoranda from the dockets, the same learned Chief Justice remarked: "There is nothing on the docket to show even that the prisoner was present when he was sentenced, except the supplementary memorandum that 'he was present in the court from the time of his arraignment up to the time when the sentence was passed upon him; indeed the whole trial, from its commencement to its termination, was according to law.'" Notwithstanding this memorandum, and the fact that it

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was made by the officer required to certify the record, it was held, and properly so (the case being frequently quoted by this court), that it did not form any part of the record, and could not be looked to for that purpose. In the language of Lord Coke: "Records are memorials or remembrances, in rolls or parchments, of the proceedings or acts of a court of justice, and are of such uncontrollable solemnity and verity that they admit of no averment, plea, or proof to the contrary. They are the memorials of the end of strife, when a dispute has been settled by the judgment of the court." As has been well said, if it were otherwise, there would be difficulty to see where litigation would end. A matter of record can be made so only by inserting it in the record.

It was said by the Supreme Court of the United States (*Taylor's Case*, 147 U. S. 695, 13 Sup. Ct. 479, 37 L. Ed. 337) that the best definition of a common-law record in a criminal case, in the American practice, is found in *McKinney v. People*, 7 Ill. 552, 43 Am. Dec. 65, where it is stated that in a criminal case, after the caption stating the time and place of holding the court, the record should consist of the indictment properly indorsed, as found by the grand jury, the arraignment of the accused, the impaneling of the jury, verdict, and judgment of the court. Mr. Chitty, in stating the contents of a record in a case of felony, says: "The record states the session of oyer and terminer, the commission of the judges, the presentment by the oath of the grand jurymen by name, the indictment, the award of the jury process, the verdict, the asking the prisoner why sentence should not be passed on him, and the judgment of death passed by the judges."—1 Chitty, Crim. Law, 719.

Of course, some of these matters are not now appropriate to our system. We have, however, statutes mak-

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ing other matters a part of such record, and making them necessary to support convictions in such cases. Among these requirements is the order setting the day for trial, and providing for the special venire from which the jury to try the case shall be selected. There is an entire absence from this record of any such order. This court has repeatedly held that this cannot be dispensed with in a capital case, not even with the consent or by the request of the defendant. No question as to it need be raised in the lower court, nor even in this court. Our statute requires this court to search the records for error. It does not even require the assignment of errors by the defendant, nor the filing of any brief calling attention to errors. Being thus by statute required to search the record for errors, and, if such are found, to reverse the case, it has been repeatedly decided by this court that this record proper cannot be supplemented by the bench notes nor by parol evidence; that the record itself, alone, must avouch its own verity, declare its own validity, or confess its invalidity; that other evidence for these purposes cannot be looked to.

How this court can affirm this judgment in a capital case, in the absence of this part of the record, I am unable to understand. The opinion it is true seems to proceed upon the theory that under the existing statutes the defendant could waive the necessity of the order, setting the day and providing the special venire; but the bench notes are the only evidence relied on to show such waiver. In this I think my Brothers have fallen into grave error, for the reason that the bench notes are not a part of the record, and cannot be made so by this court. They are not a part of the record of the lower court, and are not intended to be such, but are mere memoranda, for the aid of the court and of the clerk, in writing up the judgment and making the rec-

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ord proper. They are no more a part of the record proper to support a capital sentence than the indorsements or memoranda of a grand jury upon their docket to the effect that a certain indictment was found or not found would be an indictment. Such bench notes, standing alone, are not appropriate matter for the record proper, nor for the bill of exceptions. They may be looked to in making up the record proper or the bill of exceptions, but per se are not a part of either; and, of course, cannot be considered to vary, control, add to, or take from either the record proper or the bill of exceptions. They are often looked to or used as evidence in amending judgments *nunc pro tunc*; but, even after a judgment is amended in this manner, the bench notes themselves do not become a part of the record, but remain merely evidence thereof.

It has been repeatedly held by this court that a defendant cannot waive this order of the court setting the day for his trial and ordering the special venire. The absence of such order will work a reversal, though the defendant not only consented to the omission, but requested a trial by the regular venire for the week, and though he was acquitted of murder by being convicted of manslaughter. And his case must be reversed on appeal, though no question was raised as to the omission in either the lower court or this court.—*Bankhead v. State*, 124 Ala. 14, 26 South. 979; *Kilgore v. State*, 124 Ala. 24, 27 South. 4. It is true that section 7264 of the Code was not in effect when the *Bankhead* and *Kilgore Cases*, *supra*, were decided; but it was not the intention of the lawmakers, nor is it the effect of that section, to dispense with the order required to be made by section 7263 of the Code, except in the cases and in the manner prescribed by section 7264. This section merely provides that no special jury or venire shall be neces-

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sary for the trial of such cases, if before the special venire has been drawn the "defendant enters a plea of guilty or in writing waives the right of a special venire," stipulating that "such plea of guilty or such waiver of special venire shall be entered of record." Consequently it is just as necessary that this plea of guilty or this waiver in writing be entered of record as it is that the order shall be made setting the day for trial and for the special venire. The statute is not susceptible of any other construction, and there is no pretense in this case that such a plea of "guilty" was filed, or that such waiver was entered of record. On the other hand, the record proper absolutely refutes any such presumption, for the reason that it shows a plea of "not guilty," and there is no mention therein of his having waived a special venire.

I think that the record of this court in the concrete case bears out my position as to the insufficiency of the record to support a judgment of conviction and sentence. At a former term of this court, on a call of this case, it was contended that, because of this defect in the record, a certiorari should issue to the trial court to send up a complete record, which writ was awarded; and in response thereto the clerk of that court certified to us that the record was complete, that the only thing tending to show a waiver of a special venire was certain bench notes upon the trial docket, which, as shown above, cannot be considered by this court as part either of the record proper or of the bill of exceptions. It is matter foreign to the record in this court, whatever effect might be given to such notes, in the lower court, on an application to amend the judgment nunc pro tunc. I submit that it is a reasonable presumption that if the record could have been amended in the court below, so as to support the judgment, it would have been so

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amended, and, as amended, would have been certified to us in response to the certiorari issued for that purpose.

I am aware that there is much complaint in these days against appellate courts on account of what is termed "reversals on technical errors." To many this defect may seem a technical error; but, if so, it is not the fault of this court nor of any other court. The fault is in the law, which it is the duty of the courts, not to make, but to construe and declare. As answering such complaints, the words of Gipson, C. J. (*Commonwealth v. Lesher*, 17 Serg. & R. [Pa.] 164), are very apt, and his language has been several times quoted in the decisions of this court. In speaking of the advantages which the law has conferred upon the defendant in criminal cases, he says: "We can have nothing to do with the unreasonableness of this particular advantage. Our jurisprudence abounds with unreasonable advantages enjoyed by the accused. The least slip in the indictment is fatal. A new trial cannot be awarded after an acquittal produced by the most glaring misdirection, and the prisoner is to be acquitted wherever there is a reasonable doubt of his guilt. These and many other unreasonable advantages the law allows on principles of humanity or policy; and, if the Legislature chooses to throw in the full and exclusive benefit of peremptory challenges, who can object? No one is more thoroughly convinced of the mischievous consequences of the act of the assembly in practice and the abstract propriety of the objection to the juror here, or is more desirous of seeing the common-law remedy restored by the proper authority. But feeling, as I do, a horror of judicial legislation, I would suffer any extremity of inconvenience, rather than step beyond the legitimate province of the court, to touch even a hair of any privilege of a prisoner on trial for his life. That

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Chief Justice argued very ill, who, in a capital case, admitted a jury not freeholders, saying, ‘Why may we not make precedents to succeeding times, as well as those who have gone before us have made precedents to us?’ Such an occurrence in the trial of Algernon Sydney is spoken of in terms of indignation. Were the judges to set the law to rights as often as it should differ from their ideal standard of excellence, it is a hundred to one that their corrections would not hit the taste of those who came after them; and we should have nothing but corrections, while there would be no guide in the decision of causes but the discretion of fallible judges in the court of last resort, and no rule by which the citizen might beforehand square his actions. ‘The discretion of a judge,’ said a great English constitutional lawyer, Lord Camden, ‘is the law of tyrants; it is always unknown; it is different in different men; it is casual and depends upon constitution, temper, and passion. In the best it is oftentimes caprice; in the worst, it is every vice, folly, and passion to which human nature can be liable.’ I concede it to be one of the excellencies of the common law that it admits of perpetual improvement by accommodating itself to the circumstances of the age. But every beneficial change has been by gradations so slow as to be absolutely insensible; and to prevent even those by whom it was wrought from being conscious of it.” The remarks of Chief Justice Chilton, in *Noles’ Case*, are apt in this connection. That was a capital case, in which the defendant was sentenced to be hanged for murder, and the case was reversed solely upon the ground of a defective warrant, under which the defendant was arrested when he committed the homicide for which he was tried. In concluding the opinion, Judge Chilton said: “We are aware that this looks like a technical ground upon which to reverse a

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cause of this grave importance; but it is our duty to decide the law irrespective of consequences, and, being satisfied that the warrant is void, we have no alternative but to reverse the sentence and remand the cause that the prisoner may be again tried."—24 Ala. 672, 697.

If criminal cases were reversed on appeal only when necessary to prevent the punishment of innocent persons, no ground of reversal, if legal, would ever be considered technical by a just and fair people. It is because cases are of necessity often reversed when, according to public opinion, the defendant was unquestionably guilty, and had received nothing but a just sentence. It is such cases as these that cause the public to complain of reversals upon technical errors. But here no fault can be justly ascribed to the courts. They are to construe and declare the law which casts its protection over all persons alike. The fact that a man has committed a crime does not diminish his right to the protection which the law affords him. The innocent man, equally with the guilty, is subject to arrest, trial, and punishment. If both are convicted, the law punished both, and, if acquitted, both go free. Before either can legally be made to suffer for a crime, he must be arrested and detained in the same meshes which the law has provided. The innocent and the guilty must be proceeded against alike, step by step, according to the rules and forms which the Constitution, the statutes, and the common law have ordained. The law's forms in such cases must be pursued, or its penalties cannot be imposed. An innocent man, who, having been imprisoned in due form, breaks prison, commits as great an offense in the eyes of the law as if, being guilty, he thus escapes custody. On the other hand, a guilty man, no less than an innocent one, may refuse to be commit-

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ted to prison on a warrant not conforming to the law. The law must treat all alike, whether innocent or guilty, until the judgment of the law has been pronounced upon them. An innocent man has no more rights in arrest, detention and conviction than has the guilty man. The latter in a court has the same right to protest the proceedings against him that he has to declare his innocence. In passing upon the question whether or not the record on appeal is sufficient to support a judgment of conviction and sentence in a capital case, the question whether the defendant is guilty or innocent is a matter of no concern to the appellate court. Its duty is the same in either case. It is the court's business to see that he be not convicted except in accordance with the rules of procedure which the law prescribed, and to see that that judgment is executed if he has been so convicted and sentenced.

In my opinion appellate courts cannot afford to disregard the forms and the sufficiency of records in capital cases to support the judgments and sentences imposed. It has been well and truly said that these forms are conducive to the liberty and safety of the citizen. They are created for that purpose, and the principle has been resolutely maintained, both in England and in America, by the most distinguished jurists of these countries. It is true that, when instituted, they were intended to prevent encroachments upon the crown, as well as upon the liberty of the people in times of political persecution. These forms were brought across the water by our fathers, and claimed as a part of their heritage of the common law of England; and, while we have abandoned many of the common-law forms which were unsubstantial, we have never abandoned those which relate to the trials affecting the life and liberty of the citizen. Our Constitutions guarantee them, our

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statutes declare them, and they still live, to protect the life and liberty of the citizen. It is very true that, if we were allowed so to do, we might as individuals safely presume that the defendant had a fair and impartial trial in the trial court, that he there waived the rights secured to him, which the record fails to show that he so waived, and that his trial was in all things right; but, sitting here as a court, we can only look to the record, to this judgment and this record, which will be regarded as a precedent for all time, and, if we thus allow presumptions to be indulged, to supply omissions of these matters by the Constitution and the statutes required to be recorded, it will soon be deemed scarcely necessary to show by the record any of the important safeguards which the Constitution and statutes and the common law have so long and so strongly asserted as a shield of the liberty and life of the citizen. It will not do to say that these forms were intended only to protect the citizen against the despotism of crowns and tyrants; that he needs no such forms to protect him in this state during these times. It has been well said by a great jurist that there is no despotism so terrible, so cruel, and so unrelenting as that of the people themselves in times of great tumult and excitement, when passion and rage are stirred. These safeguards, these stern and inflexible rules of law, are, during such times of excitement, the only protection that the accused citizen has against mock trials and judicial lynchings. In this connection it may be well to remember the words of Blackstone, when comparing the English law with that of other countries. He said: "It will afford pleasure to an English reader, and do honor to the English law, to compare it with that shocking apparatus of death and torment to be met with in the criminal codes of almost every other nation in Europe.

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And it is, moreover, one of the glories of our English law that the species, though not always the quantity or degree, of punishment is ascertained for every offense; and that it is not left in the breast of any judge, nor even of a jury, to alter that judgment, which the law has beforehand ordained for every subject alike, without respect of persons; for, if judgments were to be the private opinions of the judge, men would then be slaves to their magistrates, and would live in society without knowing exactly the conditions and obligations which it lays them under. And, besides, as this prevents oppression on the one hand, so, on the other, it stifles all hopes of immunity or mitigation, with which an offender might flatter himself, if his punishment depended on the humor or discretion of the court."—2 Cooley's Bl. 376.

I am fully persuaded that the concrete error into which my Brothers have fallen in this case is that they have failed to distinguish the record in this case from those in cases like *Paris v. State*, 36 Ala. 232. In my opinion they have failed to observe this distinction pointed out in *Spicer's Case* cited and quoted from in the majority opinion. This distinction was again pointed out by Somerville, J., in *Sylvester v. State*, 71 Ala. 24, where he says: "There are few if any preliminary proceedings prior to the verdict of more importance in criminal trials than the legislative details securing the right to have a fair and impartial jury. Of these the most vital in many cases often is the order appointing a day for the trial and fixing the number of jurors to be summoned. Such an order should never be made in the absence of a defendant, and we must not presume he was present when the record omits to show the fact by positive affirmation. We believe it to be the sounder rule, and the one more in harmony with the past decis-

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ions of this court on similar questions, that the defect presented for our consideration is a reversible error, and that the failure of the prisoner to object was no waiver. The distinction between the principle settled here, and that in *Paris's Case*, 36 Ala. 232, is fully pointed out in *Spicer v. State*, and nothing need be added on that point. The two decisions are in perfect harmony." In the case last mentioned the judgment of conviction was reversed, not because no order at all was made (which is a fact in this case), but because that order failed to affirmatively show that the defendant was personally present in court when the order was made, and although the prisoner failed to object to such order or proceedings upon the trial in the lower court. Since he could not be held to have waived the privilege of being present when the order was made, surely he ought not to be held to have waived the making of any order in the premises.

This same strictness as to what the record proper should show in order to support a judgment of conviction and sentence in a capital case has been uniformly adhered to by this court as to many other parts of the record proper. This court has not only uniformly reversed, because of the absence of material parts of the record, but repeatedly reversed because of mere defects, sometimes very slight, as in the last-quoted case, where the record failed to show the appearance of the prisoner when the case was set for trial, or because of its failure to show his presence at the rendition of the verdict, or to show that the trial judge asked him if he had anything to say as to why the sentence of the law should not be pronounced upon him, or because it failed to show that the jury by their verdict determined the degree of murder as the statute requires, notwithstanding the verdict found him guilty as charged in the indict-

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ment, and fixed a punishment which was apt only as to one degree of murder. In another case, where the murder was committed by poisoning, and the indictment so alleged, the statute making murder by that means murder in the first degree, yet the judgment of conviction was reversed because of a mere defect in the record.

For these reasons, and many others which might be mentioned if time and space allowed, I am fully persuaded that my Brothers are in error in their decision of this case.

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Habeas Corpus.

(Decided January 9, 1912. 57 South. 491.)

1. *Bail; Right of Accused to.*—Where defendants were indicted for murder in the first degree, tried under said indictment and convicted of murder in the second degree, this was an acquittal of the higher offense, and entitled defendant to admission to bail.

2. *Plaing; Demurrer; Effect.*—A demurrer to a plea confesses the truth of its allegation.

3. *Criminal Law; Former Jeopardy; What Constitutes.*—Where a defendant was indicted for murder in the first degree, tried and convicted of murder in the second degree; that conviction operated as a bar to a further prosecution for murder in the first degree, notwithstanding such conviction was reversed for error committed on the trial, in ruling on a plea, since the judgment was not invalid, but was in full force and effect until reversed; section 7160, Code 1907, comes into operation only where the judgment is arrested or indictment quashed on account of defects therein or because not found by a grand jury regularly organized.

Question certified from Court of Appeals.

The question certified is as follows:

In the above entitled case the Judges of the court being unable to reach an unanimous conclusion or decision, the undersigned Judges of said court, pursuant to the provisions of the statute in such case made and pro-

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vided, hereby certify to the Supreme Court of Alabama for determination the following questions of law as to which the said Judges differ, as abstract propositions as directed and provided by statute:

Question: Are the defendants entitled as a matter of right to an order admitting them to bail in a *habeas corpus* proceeding when it appears from the record that the defendants had been indicted for murder in the first degree and were held on *mittimus* under such indictment, after a trial had been had which resulted in a conviction of murder in the second degree, from which an appeal was prosecuted to the Supreme Court and the case reversed and remanded for the reason that the trial court erroneously sustained the demurrers filed by the State to the defendant's pleas in abatement setting up as grounds for abating or quashing the indictment that the grand jury finding and returning such indictment was not drawn by an officer designated to draw the same at the time it was drawn.

In special term, this 9th day of August, 1911.

FOSTER, SAMFORD & CARROLL, and BALL & SAMFORD, for appellant. One indicted for murder in the first degree and convicted of murder in the second degree is acquitted of the higher charge, and cannot be again tried for that offense.—*Bell v. The State*, 48 Ala. 684; *Mitchell v. The State*, 60 Ala. 26. This being true, section 16 of the Constitution operates to give the petitioners bail as a matter of right.

R. C. BRICKELL, Attorney General, and W. L. MARTIN, Assistant Attorney General, for the State. No jeopardy is shown and the cause having been reversed petitioner stands as if indicted for murder in the first degree.—*Finlay v. The State*, 61 Ala. 201; *Weston v. The State*, 63 Ala. 155.

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SIMPSON, J.—This is an appeal from the decision of the chancellor on a petition to be allowed bail. The petitioners were indicted for murder in the first degree, and convicted of murder in the second degree. An appeal was taken to this court; the sole question being whether the court erred in sustaining the demurrer to a plea that the grand jury which found the indictment was not drawn "in the presence of the officers designated by law." This court reversed the case on the ground that said plea was good and that the demurrer should have been overruled.—*Spivey v. State*, 57 South. 493.

No oral evidence was offered before the chancellor; the claim of the petitioners being that the record showed that the petitioners had been tried on an indictment charging murder in the first degree, and had been found guilty of murder in the second degree, which, under our decisions, operated as an acquittal of the crime of murder in the first degree, and entitled the petitioners to bail. It is familiar law that, in order to sustain a defense of former jeopardy, or former acquittal or conviction, it is necessary that the former proceedings had been upon a valid indictment, on which a conviction could have been legally had.—12 Cyc. 261, 265.

While it is true that in this case no issue was taken upon the facts alleged in the plea, yet the defendants asserted the truth of those facts, the state, by demurring to the plea, confessed the truth of the allegations, and this court reversed the case, holding that the facts alleged, if true, established the insufficiency of the indictment, and, as a result, the judgment of conviction against the petitioners has been annulled. There are authorities to the effect that a party, having obtained the reversal of the judgment of conviction by setting up the invalidity of an indictment, cannot be allowed to secure

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a further benefit, by claiming that the judgment of conviction was valid, so as to entitle him to bail. He is estopped from asserting that the judgment of conviction was valid.—12 Cyc. p. 266b; *Joy v. State*, 14 Ind. 139, 152; *People v. Makim*, 61 Hun. 327, 329-330, 15 N. Y. Supp. 917; *United States v. Jones* (C. C.), 31 Fed. 725, 728; *State v. Meekins*, 41 La. Ann. 543, 6 South. 822, 823.

It will be noticed, in connection with what will be further said, that this refers only to the judgment of conviction. In our case of *Westen v. State*, 63 Ala. 155, 157, the cause was called for trial, and after a jury had been impaneled, and a witness sworn and examined, it was found that there had been such irregularity in the selection of the grand jury as would cause a reversal of the judgment after verdict against the defendant, and the judge stopped the case, quashed the indictment, and ordered the case to be submitted to another grand jury. On the second trial this court held that the defendant had not been in jeopardy, saying: “A defendant is never in jeopardy, when the indictment against him is so invalid that a judgment upon it would be annulled on appeal, no matter what may be the stage of the prosecution, when, *for that reason*, it is quashed.” (Italics supplied.)

In the case of *Berry v. State*, 65 Ala. 117, 122, two persons, B. and H., were jointly indicted for murder. H. was acquitted, and B. found guilty of murder in the second degree. B. appealed, and the case was reversed on account of the failure to organize the jury according to law, though no objection was raised to it in the court below on that account, and this court held that the verdict and judgment operated as a bar to another prosecution of H. and as a bar to the prosecution of B. for murder in the first degree. The court held that the de-

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fect was an error or irregularity rendering the judgment subject to be arrested on motion or reversed on appeal, but that the judgment was not void, but was in full force until avoided in the proper manner. The court does "not doubt that, if an acquittal is obtained, because of the insufficiency of an indictment—and it may be insufficient, because found by a grand jury irregularly impaneled—that the judgment will not bar a subsequent prosecution. "But," says the court, "we are considering a different case—a judgment of acquittal, rendered upon a full hearing of evidence before a jury, in the record of which errors intervened, which did not enter into or affect that judgment; errors which, not affecting it, were thereafter incapable of correction, and into which no inquiry could be made. For the state could not, because of them, move in arrest of judgment, or prosecute a writ of error. Of them the parties acquitted could not be heard to complain, for they wrought to them no injury. * * * The real and only inquiry is whether the judgment of acquittal is void, because, if an adverse judgment had been rendered, that judgment could have been arrested or reversed by the appellants, for a latent irregularity in the proceedings, available only to them, which did not enter into or produce the judgment, and which neither they nor the state could invoke, to avoid it, in any direct proceeding. Does it not result that the state, by mere indirection, mere evasion, * * * escapes from the obligation of a judgment, which directly it cannot assail, if the inquiry should be answered affirmatively?" The court goes on to show that, while this court was bound to reverse the judgment of *conviction*, yet "the judgment of acquittal of H. was not and could not be inquired into; for he was not a party to the writ of error, and from that judgment a writ of error would not lie.

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Nor would it lie from the judgment acquitting B. of murder in the first degree." The court also says that, if the irregularity had been brought to the attention of the court below, "it could have been only in reference to the judgment of conviction against B., and not in reference to so much of the verdict as acquitted him of murder in the first degree. * * * These verdicts were beyond the reach of vacation by any tribunal." The court concluded that H. was entitled to his discharge, and that B. could not again be tried for murder in the first degree.

It is true that the reasoning by Chief Justice Brickell in that case seems somewhat technical, yet it has long stood as the decision of this court; and, following the same reasoning, it cannot be said that the judgment of *acquittal* of murder in the first degree, in the present case, was based on the informality in the organization of the grand jury, although the judgment of conviction was subject to reversal by reason of said informality. The statute provides for holding the defendant to answer another indictment for the same offense only when *judgment is arrested, or indictment quashed*, on account of defects therein, or because not found by a grand jury regularly organized, etc.—Code 1907, § 7160. The indictment was not quashed in this case, but the defendants were put to trial on the facts, and the jury acquitted them of murder in the first degree, not on account of the defect in the indictment, but on the merits of the case; so that, in addition to the technical reasons, the spirit of the law is complied with by the expression of a jury on their guilt or innocence of the crime of murder in the first degree.

It may be said that the judgment was an entirety, and that the reversal of it on account of the irregularity abrogated the entire judgment, both as to conviction

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and acquittal; but this has not been the theory upon which this court has acted, for it has always held that a conviction of a lesser degree of homicide was an acquittal of the higher degree, and that, although the judgment was reversed, the defendant could not again be tried for the higher degree.

It results that the petitioners are entitled to bail as a matter of right. All the Justices concur.

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Crossing Accident.

(Decided November 23, 1911. 56 South. 731.)

1. Street Railways; Injury to Pedestrian; Pleading; Negligence.—In an action for injuries for being struck and injured by a street car while crossing a public street, a count in the complaint which alleges the injuries to have been caused by the negligence of the defendant in the negligent manner in which it ran or operated its car sufficiently charges negligence to be good against demurrer, although the charge is inferential and not categorical.

2. Same.—When it is necessary to exercise due care, a failure to do so is negligence, and hence, a count alleging that plaintiff's said injuries were proximately caused by the negligence of defendant's motorman in charge of the operation of said car, while acting within the line and scope of his employment, in failing to exercise due care after discovery of plaintiff's peril, states a situation in which the defendant owed the plaintiff the duty of diligence, even though plaintiff had negligently gone on the track, and is a sufficient statement of negligence, though it does not aver that the motorman negligently failed to use due care.

3. Same; Pleading; Contributory Negligence.—Where the action was for injuries received by being struck by a car, a plea setting up plaintiff's contributory negligence proximately contributing to her alleged injury which consisted in her going upon and remaining on or dangerously near the railroad track of the defendant in front of or dangerously near to a car then and there approaching on said track, while good as against a count in simple negligence, is not good against wanton counts, or a count charging a failure of the defendant's motorman to use due care after discovery of peril.

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4. *Same; Instructions.*—Where, under the evidence, it was a question for the jury to determine whether plaintiff was permanently injured and if so, how far in the future such injuries would affect her earning capacity, the court properly denied a charge asserting that if the jury believed the evidence, they could not award plaintiff any damages for decreased earning capacity; such charge was also improper as pretermittting the right of plaintiff to recover nominal damages on that issue.

5. *Appal and Error; Review; Wrong Grounds.*—Where a plea was framed in the alternative, one alternative stating no defense, a point not taken by the demurrer, and the demurrer was sustained erroneously for the sole reason that it stated a conclusion, the defect of a bad alternative which was not relied upon cannot be taken to sustain the ruling thereon.

6. *Same; Harmless Error; Pleading.*—Where the defendant filed another plea under which it had the full benefit of the defense set forth in a plea to which demurrer was sustained, any error in sustaining such demurrer was harmless.

7. *Witnesses; Impeachment; Necessity for Predicate.*—Where no statement was made to the court as to the purpose of the cross-examination of a witness as to statements made by her in her answers to interrogatories propounded before the trial, it was not necessary for the court to inquire whether the purpose of such cross-examination was to contradict and impeach the witness, or to test and refresh their memory, and the court will not be put in error for sustaining objections to the questions.

8. *Same.*—Where it was sought to impeach the testimony of a witness by showing conflicting statements made in answers to interrogatories, the proper and necessary course is to put the answer in the hands of the witness, if they can be had, and ask him whether it is his answers and depositions, and hence, where a witness was simply questioned as to whether or not he had made a conflicting statement, without either showing or an offer made him to show him his deposition, a sufficient predicate for impeachment was not shown.

APPEAL from Jefferson Circuit Court.

Heard before Hon. A. O. LANE.

Action by Lillian Bush against the Birmingham Railway, Light & Power Company, for damages for injury received in collision with a street car on a public street. Judgment for plaintiff and defendant appeals. Affirmed.

TILLMAN, BRADLEY & MORROW, and CHARLES E. RICE, for appellant. The court erred in overruling demurrers to the first count as amended.—*B. R. L. & P. Co. v.*

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Weathers, 164 Ala. 23; *Republic I. & S. Co. v. Williams*, 53 South. 78. The court erred in overruling demurrers to the 2nd count.—*A. G. S. v. McWhorter*, 156 Ala. 277. Counsel discuss the action of the court in sustaining demurrers to pleas 2, 3 and 4, but cite no authority in support thereof. The court erred in its rulings on the evidence.—*Grasselli Chem. Co. v. Davis*, 166 Ala. 477. Counsel discuss the charges refused, but without citation of authority. They insist that the court erred in its general charge to the jury in the matter excepted to.—*B. R. L. & P. Co. v. Moore*, 163 Ala. 45; *Same v. Jones*, 146 Ala. 284; *Same v. Landrum*, 153 Ala. 201; *A. G. S. v. Hanbury*, 161 Ala. 381, and authorities supra.

FRANK S. WHITE & SONS, for appellee. The court was not in error in its rulings on the complaint. The 1st count has been approved in the following cases.—*C. of Ga. v. Foshee*, 125 Ala. 199; *Same v. Freeman*, 134 Ala. 354; *Mont. St. Ry. v. Armstrong*, 123 Ala. 233; *Am. Bolt Co. v. Feunell*, 158 Ala. 180; *Duncan v. St. L. & S. F.*, 152 Ala. 118. The same authorities show that count 2 was good.—*Mobile L. & R. Co. v. Baker*, 158 Ala. 491; *L. & N. v. Calvert*, 54 South. 185. Defendant's second plea is not good.—*Creola L. Co. v. Mills*, 149 Ala. 482; *Osborn v. Ala. S. & W. Co.*, 135 Ala. 571; *L. & N. v. Calvert*, *supra*. Besides, the plea is alleged in the alternative.—121 Ala. 224; 94 Ala. 418; 39 South. 830. The defendant had the benefit of this plea under others to which no demurrers were sustained.—*B. R. L. & P. Co. v. Lee*, 153 Ala. 84. On these same authorities, demurrers were properly sustained to plea 3. Besides, this plea was not good, as to the counts charging wantonness, or subsequent negligence.—*So. Ry. v. Stewart*, 153 Ala. 137; *Duncan v. St. Lous*, *supra*; *L. & N. v. Brown*, 121 Ala. 221. On the above authorities, the court prop-

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erly sustained demurrers to plea 4. Counsel discuss the evidence, but without citation of authority. Charge 5 was properly refused.—*B. R. L. & P. Co. v. Landrum, supra*; *Mont. St. Ry. v. Lewis*, 148 Ala. 142. Counsel discuss the other charges refused, but without citation of authority.

SAYRE, J.—It is averred in the complaint that plaintiff was injured while crossing a public street by being struck by a street car operated by the appellant corporation. In count 1 plaintiff concludes by averring that “her said injuries were caused by the negligence of the defendant in the negligent manner in which it ran or operated its car.” This count is criticised as not containing a categorical averment of negligence. Mere general averments of negligence in cases of this character have been so often sustained that the principle involved is not open to question. It is curious to observe that the very effort to encourage and uphold the utmost simplicity of averment has led to some confusion; the result being due perhaps to an effort in some cases to push the practice beyond all reason. However, in this case, we are unable to find reversible error in the rulings on demurrer. Substantially this form of averment, though in strictness it is inferential, has had indorsement in cases heretofore.—*Birmingham Ry., L. & P. Co. v. Adams*, 146 Ala. 267, 40 South. 385, 119 Am. St. Rep. 27; *L. & N. R. R. Co. v. Church*, 155 Ala. 329, 46 South. 457, 130 Am. St. Rep. 29; *Birmingham Ry., L. & P. Co. v. Haggard*, 155 Ala. 343, 46 South. 519. There has been no dissent from these precedents as furnishing a sensible and practical form of averment in ordinary cases of this character. The considerations which influenced the decision in *Birmingham Ry., L. & P. Co. v. Weathers*, 164 Ala. 23, 51 South. 303, find no field for operation in the case at bar.

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Count 2 concludes by averring that plaintiff's "said injuries were proximately caused by the negligence of the defendant's motorman in charge of the operation of said car, while acting within the line and scope of his employment, in failing to exercise due care after discovering plaintiff's peril." In addition to the points taken against count 1, which are here repeated, appellant seems to insist that the count is bad because it does not allege that defendant's motorman negligently failed to exercise due care. But a failure to exercise due care, where care is demanded, is negligence. The count states a situation in which the defendant owed plaintiff the duty of diligence to avoid injuring her notwithstanding she may have negligently gone upon the track, and was for anything we see a sufficient statement of negligence under the authority of our cases.—*Southern Ry. Co. v. Arnold*, 162 Ala. 570, 50 South. 293, and cases supra.

The rule has been frequently held to be that a plea of the plaintiff's contributory negligence must set forth the facts constituting the negligence, and that mere conclusions will not suffice. In its second plea "defendant says that plaintiff was herself guilty of negligence which proximately contributed to her alleged injuries, and that her said negligence consisted, in this: Plaintiff negligently went upon, or dangerously near, or remained upon, or dangerously near, the railway track of defendant in front of and in dangerous proximity to a car then and there approaching on said track." Obviously this plea was no answer to the charge of wanton injury contained in counts 4 and 6. Count 2 charged that defendant's motorman failed to exercise due care after he discovered plaintiff's peril, a charge of subsequent negligence as it is commonly termed. Plaintiff's negligence in going upon the track was no

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sufficient answer to this count.—*L. & N. R. R. Co. v. Brown*, 121 Ala. 221, 25 South. 609; *Central of Georgia v. Foshee*, 125 Ala. 199, 27 South. 1006. Other counts proceeded as for simple initial negligence. The plea is framed in the alternative. Both alternatives must be sufficient. Probably the demurrant might have a good ground of demurrer to the second alternative, which, construed against the pleader, was that plaintiff remained upon or dangerously near the railway track of defendant in front of and in dangerous proximity to a car then and there approaching on said track. That these facts do not per se constitute contributory negligence is clear, for, if so, no one who is run down by a car could ever recover. The plea needed a further averment of facts which would show the act of plaintiff to have been negligent, or, since the facts averred may or may not have constituted negligence, according to the construction to be put by the jury upon the entire context of the plaintiff's environment at the time, a matter sometimes beyond the reach of specific allegation, the act of plaintiff should have been averred to have been negligently done. But the demurrer did not take this point. It touches the question of alternative averments only by saying that the plea sets out several defenses in the alternative, and that the first alternative is no answer to the complaint. In respect to the first alternative averment of the plea, to wit, that plaintiff negligently went upon, or dangerously near, the track in front of and in dangerous proximity to a car then and there approaching on said track, my opinion is that it sufficiently states a case of contributory negligence. Other rulings on demurrs to pleas of the same general character make it apparent that the demurrer to the plea in question was sustained for the reason that it stated a mere conclusion. *L. & N. R. R. Co. v. Calvert*,

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172 Ala. 597, 54 South. 184, is cited on appellee's brief as sustaining the ruling below. But I apprehend that if the plea condemned in that case had shown that the train was in dangerous proximity at the time when plaintiff saw it approaching and measured the chance of crossing the track, and had alleged that thereupon he negligently attempted to cross, the ruling would have been different. It seems that the only possible objection to the plea in that case in that shape would have been that the plea failed to measure the distance. But to require in pleading the definition of every word and phrase like that would lead only to an interminable multiplication of words with no countervailing advantage in clearness of idea or expression. The plea in the shape I have suggested would have advised the plaintiff of every essential element of the proposed defense, and served every purpose of pleading. My conclusion is that the plea in the present case, as for any objection taken to it, was a sufficient answer to the counts going upon simple initial negligence, and that there was error in sustaining the demurrer. But plea 3, upon which, along with others, the case was tried, averred that "plaintiff went upon or dangerously near the railway track of defendant in front of, and in dangerous proximity to, a car then and there approaching on said track without looking for the car which struck her, or plaintiff, having looked for said car, negligently failed to (see) the same, or plaintiff, having looked and having seen said car, nevertheless negligently went upon or dangerously near the railway track of defendant in front of and in dangerous proximity to said car." Under that plea, defendant had the full benefit of the defense set up in plea 2. It results that the error in sustaining the demurrer to plea 2 was harmless, and cannot work a reversal.

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The fourth and fifth assignments of error proceed upon the idea that pleas 3 and 4 were sufficient answers to count 2 because that count failed to state a case of negligence on the part of defendant's motorman after he had discovered plaintiff's peril, as it undertook to do. But the trial court had ruled otherwise in respect to the count, and we have stated our conclusion that there was no error in so ruling.

Plaintiff claimed in her complaint that she has been permanently injured and disabled, and that her injuries rendered her less able to earn a livelihood. Before the trial she had answered interrogatories propounded to her by the defendant under the statute for the examination of adverse parties. On cross-examination at the trial, testifying as a witness in her own behalf, she deposed that her salary prior to her injury had been \$100 a month, whereupon defendant asked her this question: "Isn't it a fact, Mrs. Bush, that your salary was \$75 a month, and didn't you so state in your answers when you answered the interrogatories?" The court sustained the plaintiff's general objection to this question, and the defendant excepted. Counsel for appellee concede that an inquiry as to the amount of her salary before her injury, omitting the remainder of the question, would have been proper, and justifies the ruling below on the ground that her answers to the interrogatories were the best evidence of what she then said. Appellant relies upon the recent case of *Grasselli Chemical Co. v. Davis*, 166 Ala. 477, 25 South. 35.

In *Gunter v. State*, 83 Ala. 96, 3 South. 600, our predecessors held that the trial court had properly refused to permit a witness to be interrogated on cross-examination as to particular statements made before a committing magistrate on preliminary hearing, such statements having been reduced to writing, and being then in court in the possession of counsel, but not

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shown to the witness. It was considered that the court would not undertake to inquire whether the purpose of such a mode of examination was to contradict and impeach the witness, or to test, or even refresh, his memory. It is the settled rule of this state, as it is of nearly all the states, and as it was in England prior to 1854, that the proper and necessary course is to put the writing, where that can be had, in the hands of the witness, and to ask him whether it is his writing or deposition.—*Wills v. State*, 74 Ala. 24; *Phoenix Ins. Co. v. Moog*, 78 Ala. 310, 56 Am. Rep. 31; *Floyd v. State*, 82 Ala. 22, 2 South. 683; 1 Greenl. Ev. (16th Ed.) §§ 463-465a, and notes to last-cited section. Prof. Wigmore, who edited the sixteenth edition of Greenleaf, adding section 465a, criticises this rule as both unsound in principle and unfair in policy, regards its alteration by statute in England as a just step, and regrets that, owing in part, as he puts it, to ignorance of the change and of the reasons for it, so many of the courts of this country came to adopt the English rule long after its repudiation in the jurisdiction of its origin. But this court has adhered to the rule after knowledge of the change in England.—*Gunter v. State*, *supra*.

In *Southern Railway Co. v. Hubbard*, 116 Ala. 387, 22 South. 541, the court pretermitted as unnecessary in that case a decision of the question whether a party, having taken the deposition of his adversary under the statute, may use in evidence specific portions of the answer, not as proof of the facts therein stated (for it had been decided that if he offers a part of an answer in evidence he thereby makes the whole evidence), but for the purpose of impeaching his adversary as a witness by showing that he has made contradictory statements. The ruling in that case was put upon the specific ground that, if such use of a part of the answer were permissible, yet no predicate had been laid nor had the

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trial court been given to understand clearly that the part was offered for the purpose of impeachment only.

In *Birmingham Railway Co. v. Oden*, 164 Ala. 1, 51 South. 240, it was said that "it would be a perversion of the purposes of the statute to permit the rule of construction placed upon it (referring to the statute for the examination of adversary parties and the decisions holding that, if the party taking the answer offers a part, he makes the whole evidence) to be evaded, and a part only of the answer introduced, upon the suggestion of laying a predicate for impeachment."

In the *Grasselli Case, supra*, it was said that merely showing the answer to the witness would not be introducing it in evidence, and the action of the trial court in refusing to permit the defendant to lay a predicate for impeachment, by asking the plaintiff on cross-examination whether he had not made contradictory statements when examined under the statute, was held for error. The effect of this was to decide that a party who has taken the deposition of his adversary under the statute may use a part of it for the single specific purpose of impeachment without making the whole evidence, and we think this a sound rule. We think, also, that, when a party so uses a part of his adversary's answer, the adversary party may use such other parts of his answer as may serve to explain the contradiction. It is our further opinion that in such cases the predicate for impeachment must be laid in the manner prescribed in *Gunter v. State, supra*, and the other cases in the same line.

Our conclusion in the case at bar is that no error appears for the reason that the purpose to impeach was not stated to the court, and because, as for anything appearing in the bill of exceptions, the appellant, when laying its predicate, if that was its purpose, did not show, nor offer to show, his deposition to the witness.

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The only other question seeming to require attention upon this appeal arises out of the court's refusal to charge the jury as follows: "If you believe the evidence, you cannot award any damages for decreased earning capacity." The claim of the complaint in this connection has been stated. Plaintiff at the time of the injury complained of and since was and is employed as buyer in a department store. Her duties keep her constantly on her feet. Testifying two years after her hurt, she said that she still suffered pain and inconvenience from her injuries. A physician testified that her injuries were likely to remain with her indefinitely unless corrected. Of the probability of correction he was not asked to say anything. On the other hand, the evidence went to show that since her injury plaintiff had been in the receipt of a salary or wages equal to or even greater than that she was earning at that time. On these facts we cannot say that the jury were not authorized to infer that plaintiff's earning capacity for the future would be impaired to some extent by reason of her injuries. However doubtful it may have been that plaintiff's condition resulted from her contact with defendant's car, that, as well as the question whether her injuries were permanent, and, if so, to what extent they would in the future affect her earning capacity, were questions for the jury, and the charge under consideration was refused without error on the theory stated in the recent case of *Sloss-Sheffield Steel & Iron Co. v. Stewart*, 172 Ala. 516, 55 South. 785.

The judgment must be affirmed.

Affirmed.

ANDERSON and McCLELLAN, JJ., hold that the demurrer to plea 2 was properly sustained. DOWDELL, C. J., and SIMPSON, MAYFIELD and SOMERVILLE, JJ., concur in the opinion. All the justices concur in the conclusion.

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Injury to Passenger.

(Decided November 16, 1911. 56 South. 574.)

1. New Trial; Grounds; Excessive Damages.—As the question of damages rests largely in the discretion of the jury in personal injury actions a trial court will not set aside a judgment merely because in its opinion it is excessive or inadequate, and where the trial court has declined to set aside the verdict, the appellate court will not substitute its judgment for that of the trial court and jury unless the amount is so excessive or inadequate as to indicate prejudice, passion, partiality or corruption on the part of the jury.

2. Appeal and Error; Review; Amount of Damages.—Unless the case presents extraordinary features, where the verdict is greatly above or greatly below the average, it is fair to infer that partiality, prejudice, or other improper motives, influenced the jury, thus justifying the setting aside of the verdict.

3. Same.—Where there had been two trials on substantially the same evidence, and there is a large discrepancy between the two verdicts, such will authorize the reversal of the judgment on the second trial, but unless the evidence on the two trials is substantially the same, the refusal of the court to set aside the verdict on the second trial, which was largely in excess of the verdict on the first trial, is not of itself erroneous.

4. Same; Matters Considered.—In arriving at what is a fair average of damages in similar cases, and determining whether the damages awarded are excessive or inadequate, the court of appeal, must resort to common knowledge, common experience, and general observation, and apply the same to the particular case in hand.

5. Same; Presumption.—In determining whether a verdict in a personal injury action is excessive, the court will presume that the jury found that the extent and nature of plaintiff's damages under plaintiff's evidence, was true and correct, although contradicted by defendant's evidence.

6. Damages; Personal Injury; Excessive.—The facts of the case stated and other authorities examined and it is held that a verdict for \$16,000 approved by the trial court would not be disturbed on appeal.

APPEAL from Jefferson Circuit Court.

Heard before Hon. A. O. LANE.

Action by Annie E. White against the Central of Georgia Railway Company, for damages for injuries re-

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ceived while a passenger. Judgment for plaintiff for \$16,000.00, and defendant appeals. Affirmed.

LONDON & FITTS, for appellant. Counsel insist that the judgment was excessive and should be set aside, and a new trial ordered.—93 Pac. 155; 111 S. W. 542; 92 Pac. 691; 80 N. E. 349; 105 S. W. 160; 106 S. W. 242; 103 S. W. 1102; 99 S. W. 472 and 915; 215 Fed. 264; 51 N. E. 884; 60 N. E. 104; 64 N. E. 718; 54 Pac. 4; 81 S. W. 152; 91 S. W. 109; 77 S. W. 127; 79 N. W. 17; 54 N. Y. S. 958; 94 N. Y. S. 150; 46 S. W. 101; DuBois Psychic Treatment of Nervous Disorders, 357; Herrick's Railway Surgery, 624; 36 L. R. A. 586; 110 S. W. 520; 98 S. W. 1070; 46 South. 59; 80 Pac. 1002; 74 Pac. 1064; 77 N. Y. S. 395; 52 N. E. 21; 75 N. E. 797; 82 S. W. 827; 29 South. 990; 69 N. W. 900; 65 S. W. 959; 70 N. E. 855; 103 Wis. 27; 102 Mo. 438; 15 Daley, 374; 49 Am. Rep. 729. It is the function of the Supreme Court and the trial court in this regard to limit the exercise of the jury's discretion to reasonable, practicable and proper limits.—130 Ala. 256; 73 Ala. 248; 95 Ala. 148; 108 Ala. 233; 97 Ala. 171; 97 Ala. 194.

FRANK S. WHITE & SONS, for appellee. Counsel discuss the motion to dismiss the bill of exceptions, but in view of the opinion, it is not deemed necessary to here set it out. Counsel discuss the evidence, and insist that the court was without error in declining to set aside the verdict and grant the defendant a new trial.—*So. Ry. Co. v. Crowder*, 130 Ala. 265; *Mont. T. Co. v. Knabe*, 48 South. 505; *A. G. S. v. Bailey*, 112 Ala. 167; *Bir. T. Co. v. Reville*, 136 Ala. 335; 3 A. & E. Enc. of Law, 628; *Cobb v. Malone*, 92 Ala. 633; *Ala. Mid. v. Johnson*, 123 Ala. 202; *Northern Ala. Ry. Co. v. Counts*, in MSS; *Mont. v. Wyche*, 169 Ala. 181; *Woodward I. Co. v. Sheehan*, 166 Ala. 429.

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SOMERVILLE, J.—The plaintiff, a passenger, was injured in a train wreck on the defendant's road in May, 1907. In January, 1909, she had verdict and judgment for \$16,000 as compensatory damages for her injuries, including mental and physical suffering. The defendant moved for a new trial on the ground that the verdict was excessive in amount, and now appeals from the judgment of the court overruling this motion.

On such an appeal the functions and powers of this court are correctly stated as follows:

"As the question of damages is in such cases a matter of discretion for the jury, the trial court will not set aside a verdict for damages merely because in its opinion the jury gave too much or too little. And, where a trial court has refused to disturb a verdict on account of the amount of the recovery, the appellate court is very reluctant to substitute its judgment for that of the jury and the court below. To such an extent is the measure of recovery, where not susceptible of a pecuniary estimate, deemed a matter of discretion for the jury, that the universal rule is that a judgment will not be reversed on this ground alone, unless the amount is so excessive or so grossly inadequate as to be indicative of prejudice, passion, partiality, or corruption on the part of the jury."—8 Am. & Eng. Ency. Law (2d Ed.) 628 (cited in *Montgomery Traction Co. v. Knabe*, 158 Ala. 458, 48 South. 501). To the same effect are Watson's Damages in Personal Injury Cases, §§ 311, 328, 329, 330; and 4 Sutherland on Damages, § 1256. See, also, *National Surety Co. v. Mabry*, 139 Ala. 225, 35 South. 698, where a substantially similar test is applied to verdicts involving punitive, as distinguished from compensatory, damages.

The practical application of this rule by appellate courts to verdicts challenged for this alleged vice is a matter of great difficulty as well as delicacy.

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As a general guide, we approve the following statement by Mr. Sutherland: "There is no absolute rule to determine whether a verdict awards an excessive amount or not. It has been held that, if the sum allowed is much above or greatly below the average, it is fair to infer, unless the case presents extraordinary features, that partiality, prejudice, or some other improper motive has led the jury astray."—4 Sutherland on Damages, § 1256, p. 3669.

He adds in the same connection: "And if there have been two or more trials of an action, and the evidence has not been materially different as to the extent of the plaintiff's injuries, a large discrepancy between the final and the previous awards will authorize the reversal of a judgment for an amount greatly in excess of that first awarded. But the application of this rule depends upon the fact that the evidence is substantially the same on each trial." In the present case the defendant offered to show the fact of a former verdict for the plaintiff in this case for \$10,000. There was no suggestion, however, that the evidence on the two trials was substantially the same, and hence we cannot put the trial court in error for not considering that fact; and, the fact itself not being properly before us, we can give it no weight here.

In arriving at what is a fair average of damages in similar cases, it is evident that the revising tribunal must resort to common knowledge, common experience, and general observation; and must then apply these to the particular case in hand.

The plaintiff, a woman 64 years of age, claims that she suffered great and enduring pain for many months after her injuries were received, and more or less regularly ever afterwards, due, as alleged, to severe concussion and contusion of her spine and pelvis, and result-

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ing specifically in bladder disease, with chronic and permanent incontinence of urine, stiffness of neck, arms, and legs, and general impairment of health and strength, amounting to practical and permanent physical disability. She was confined to her bed, unable to move except slightly, and with torturing pain, for several weeks, and to her room for several months. Formerly able bodied and active, she has not been able since her injuries to attend to her own wants, and locomotion is difficult, painful, and dangerous. The tendency of the evidence offered in her behalf, including the testimony of herself, her daughter, her son-in-law, and her family physician, Dr. Moore, is to support and establish these claims with respect to her suffering and her physical disorders and disabilities; at least, it was open to the jury, in view of all the evidence, to reach conclusions favorable to plaintiff's claims.

For the purposes of this appeal, therefore, we must treat the case as if these injuries and resulting conditions were conclusively established by the evidence and figured in the findings and verdict of the jury; for, if we can reasonably do so, we are bound to attribute the size of the verdict to the effect of the evidence, rather than to passion, prejudice, or other improper mental attitude of the jury.

A large collection of personal injury cases reported in the various states, illustrative of the attitude and practice of juries and courts with respect to the amount of damages to be awarded and allowed as compensation where the injuries are permanent, and the pain and suffering more or less great and enduring, will be found in 4 Sutherland on Damages (3d Ed.) pp. 3670-3687. A study of these cases produces the impression that neither courts nor juries have any very definite notions or standards in dealing with this subject. We collate a few of the cases in which the plaintiffs were women, and

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where an earning capacity apparently was not considered in the estimation of damages:

"An injury to a woman in the prime of life whose pursuits required all her physical faculties and which permanently disabled her was not excessively compensated for by \$3,500.—*Calder v. Smalley*, 66 Iowa, 219, 23 N. W. 638, 55 Am. Rep. 270.

"A verdict for \$5,000 for injuries which permanently destroyed the use of a lower limb of a healthy, active woman of 70 years was sustained.—*Hinton v. Cream City R. Co.*, 65 Wis. 323, 27 N. W. 147.

"A woman aged 57 was permanently deprived of the use of her left arm, her power to move was impaired, a shoulder bone broken, her spine injured and her general health affected, and her system rendered more liable to disease. A verdict for \$5,000 was not excessive.—*Texas Pacific R. Co. v. Davidson*, 68 Tex. 370, 4 S. W. 636.

"In *Groves v. Rochester*, 39 Hun. [N. Y.] 5, the suit was by a husband and his wife to recover for injuries to the latter, who was 28 years of age when the accident occurred. The nature of the injuries is not fully disclosed by the report, except that they were severe and her suffering has been very great. She still suffers from the effect of them; and medical opinion is that she may never fully recover, and that they may materially shorten her life. A verdict for \$19,000 was sustained.

"In *Shaw v. Boston & W. R. Corp.*, 8 Gray [Mass.] 45, a woman lost one arm and the use of the other, and was much bruised and injured otherwise so as to greatly injure and impair her health and memory and cause constant pain. There were three trials which resulted in verdicts for \$15,000, \$18,000, and \$22,250, respectively. The last amount was held not to be excessive.

"An injury to a woman of 60 years, which resulted in progressive paralysis and disabled her from following

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her business as a midwife (which was lucrative), was not excessively compensated for by \$6,000.—*Wardle v. New Orleans, etc., R. Co.*, 35 La. Ann. 202.

“A verdict for \$6,565 for injuries permanently and completely disabling, and leaving in a condition of suffering, a woman of 44, who had previously done all her housework and earned from \$6 to \$12 per week besides, was not disturbed.—*Miller v. Boone County*, 95 Iowa, 5, 63 N. W. 352.

“In a case in which there was great injury to the right arm and shoulder, some of the internal ligaments of the shoulder joint being seriously ruptured, the plaintiff having suffered great pain for two years, her memory being impaired, and she being unable to perform services of any value, a verdict for \$15,000 was not disturbed.—*Morgan v. Southern Pacific Co.*, 95 Cal. 510, 30 Pac. 603, 17 L. R. A. 71 [29 Am. St. Rep. 143].

“A verdict for \$7,000 in favor of an unmarried woman of 35, in excellent health, for injuries causing great pain and which disabled her for active exercise and permanently shattered her nervous system, was upheld.—*Illinois Central R. Co. v. Robinson*, 58 Ill. App. 181.

“Where the immediate injury, a wound on the knee, caused a nervous shock which resulted in the development of heart disease and a nervous disorder, both of which were probably permanent, and rendered the plaintiff, a previously healthy, active woman, a helpless invalid, a judgment for \$10,000 was affirmed.—*Galloway v. Chicago, etc., R. Co.*, 56 Minn. 346, 57 N. W. 1058, 23 L. R. A. 442, 45 Am. St. Rep. 468.

“A verdict for \$17,000 in favor of a woman of 35 who was, previous to her injury, in good health and able to attend to all her household duties, was regarded as excessive for a partial disability, though much suffering

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had been endured. Some stress was laid upon the fact that the plaintiff had not been earning money, and had no qualification for doing so, so far as the evidence disclosed.—*Louisville & N. R. Co. v. Creighton*, 106 Ky. 42, 50 S. W. 227, 20 Ky. Law Rep. 1691.

“The sum of \$14,000 in favor of a woman of 35, whose previous health had been good, who suffered greatly and who must continue to suffer or submit to a surgical operation by which the injured organs may be removed, which operation might imperil her life, is not excessive.—*Illinois Central R. Co. v. Cheek*, 152 Ind. 663, 678, 53 N. E. 641.”

In this state the only reported cases approximately like the instant case in the respects above noted are *Southern Railway Co. v. Crowder*, 130 Ala. 256, 30 South. 592, and *Montgomery Traction Company v. Knabe*, 158 Ala. 458, 48 South. 501. In *Crowder's Case* a woman whose age is not shown was awarded \$15,000 by the jury, and the trial court declined to interfere. On appeal this court said, per Sharpe, J.: “Evidence which was undisputed tends to show that by her fall plaintiff sustained serious hurts, among which was a fracture of a bone in the hip joint in the treatment of which she was for several weeks kept prostrate with a weight suspended to her foot, and that this hip injury has resulted in impairment of plaintiff's general health and a permanent stiffening and shortening of her leg to an extent which will henceforth deprive her of its natural use. The jury was authorized to award for recovery a sum which would furnish reasonable compensation for these injuries and the suffering naturally attendant thereon. The law committed the ascertainment of that sum to the jury's discretion, and to the court the duty, in that regard, only of confining the exercise of that discretion to reasonably proper and practicable limits. In the record we do not find warrant for de-

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claring that the trial court erred in determining these limits were not exceeded." In *Knabe's Case* a woman 75 years of age was awarded \$12,500 by the jury, which was reduced by the trial court to \$10,000. In this case the plaintiff's leg was amputated, and on appeal this court said, per Denson, J.: " * * * The testimony further showed that, while plaintiff was 75 years old, her physical condition prior to the injury had been very good for a lady of her age, that she was active, able to walk downtown and return, and attend to her flowers; that since the injury plaintiff suffers almost constantly and is very weak; that she cannot go about otherwise than in a roller chair, being too weak to walk on crutches. * * * Considering the elements of damage in the case, and remembering that the authority vested in courts to disturb the verdict of a jury on the ground of excessive damages is one which should be exercised with great caution and discretion, (we) are constrained, under the circumstances in proof, to hold that the ruling of the trial court declining to set aside the verdict after its reduction to \$10,000 should not be disturbed." In view of the principles of law which temper and restrain our action, and in the light of the precedents before us, we are unable to say that we are reasonably satisfied that the large amount of this verdict is the result of passion, prejudice, partiality, or corruption on the part of the jury. As jurors, or as independent critics, we might not hesitate to disapprove a verdict which dispenses damages with so lavish a hand as this; but, as an appellate tribunal, whose revisory powers are guided and controlled by clearly defined limitations, we do not feel authorized to set it aside, especially in the face of the refusal of the trial judge to do so.

The judgment is affirmed.

Affirmed. All the Justices concur.

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Rice *v.* Southern Railway Company.

Crossing Accident.

(Decided November 21, 1911. 56 South. 587.)

1. *Railroads; Trespassers; Duty Owed.*—A railway company owes the duty to a trespasser not to willfully or wantonly injure him, or not negligently to do so, after discovering his peril.

2. *Same; Pleading; Complaint.*—A complaint alleging that defendant through its agents or servants so negligently operated one of its train that it caused the death of plaintiff's intestate, without alleging the relation or the condition or circumstances surrounding the accident, fails to disclose that plaintiff's intestate was not a trespasser.

3. *Discovery; Interrogatories; Answers.*—Where an answer to an interrogatory is not shown not to be pertinent, it should not be stricken out merely because it is irreponsive.

4. *Appeal and Error; Record; Questions Presented.*—Where the count on which the case was tried is not disclosed by the record, this court cannot review the rulings of the trial court upon evidence and instructions relative to such count.

APPEAL from Lawrence Circuit Court.

Heard before Hon. D. W. SPEAKE.

Action by W. F. Rice as administrator, against the Southern Railway Company, for damages for the death of his intestate. Judgment for defendant, and plaintiff appeals. Affirmed.

Count 1 is as follows: Plaintiff claims of defendant the sum of \$25,000.00, as damages for that, heretofore, on or about April 18th, 1910, defendant owned a railroad through the town of Hillsboro, Lawrence County, Alabama, and ran and operated trains thereon as a carrier of passengers and freight for hire, on said above named date, and at or near Hillsboro in Lawrence County, Alabama, defendant, through its agents or servants, so negligently operated one of its trains that it caused the death of plaintiff's intestate, to his damage. The 12th interrogatory inquired as to the crossing of a

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public road at a place known as Old Hillboro, and if the train was going in that direction, and how far the train was from the crossing when the man was killed, and if it was in sight of the crossing within the view of the engineer and fireman at that time, and had the engine blown the whistle for the crossing before the man was killed, and if at the time the engineer was looking ahead down the track for obstructions, or objects on or near the track, and if so how far ahead could he see. In answering the interrogatories, the engineer stated among other things, that he was ringing the bell as he approached this crossing, and plaintiff who had propounded the interrogatories under the statute moved to exclude so much of the answer as is set out above because not responsive to the interrogatories. .

CHENAULT & CHENAULT, and E. W. DOWNING, for appellant. The court committed error in sustaining demurrer to the 1st and 3rd counts.—*H. A. & B. R. R. Co. v. Robbins*, 124 Ala. 113; *West Pratt C. Co. v. Andrews*, 43 South. 348; *L. & N. v. Jones*, 83 Ala. 376. The answer is irresponsible to the question, and should have been stricken.—*First Nat. Bank v. Leland*, 122 Ala. 289. Counsel discuss the evidence, and the giving and refusing of charges, with citation of authorities, but in view of the opinion it is not deemed necessary to here set them out.

C. M. SHERROD, and D. C. ALMON, for appellee. No brief reached the Reporter.

ANDERSON, J.—The judgment entry and brief of appellant's counsel indicate that the complaint consisted of 4 counts, two original ones and 3 and 4 added by way of amendment. It also appears that demurrers were sustained to counts 1 and 3 and overruled as to 2

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and 4. It also appears that count 2 was withdrawn by the plaintiff, and the case was tried on count 4 alone. We have searched the record in vain for counts 3 and 4, and find no counts at all in the proper place in the record, but have succeeded in finding two unnumbered counts sandwiched in on lettered pages between pages 136 and 137 in the bill of exception part of the record. These two counts are unnumbered; but, owing to the date of filing and the fact that they appear between the summons and the return, we can only treat them as original counts 1 and 2. Count 2 was voluntarily withdrawn by the plaintiff, and there was no error in sustaining the defendant's demurrer to count 1. "While a complaint need not define the quo modo, or specify the particular acts of diligence omitted, yet, when simple negligence constitutes the cause of action, it is incumbent upon the plaintiff to bring himself within the protection of the negligence averred by alleging such a relationship as would enable him to recover for simple negligence."—*L. & N. R. R. Co. v. Holland*, 164 Ala. 73, 51 South. 365, 137 Am. St. Rep. 25; *Gadsden R. R. Co. v. Julian*, 133 Ala. 373, 32 South. 135; *Ensley Ry. Co. v. Chewning*, 93 Ala. 25, 9 South. 458.

For aught that appears from count 1, the intestate was a trespasser, and the only duty that the defendant owed him was not to willfully or wantonly run over him or not to negligently do so after discovering his peril, and which said averment is utterly wanting in said count 1. The case of *Highland Ave. R. R. Co. v. Robbins*, 124 Ala. 113, 27 South. 422, 82 Am. St. Rep. 153, cited by counsel, is not only not in conflict with this holding, but supports us in deciding that count 1 makes the intestate a trespasser.

The trial court did not commit reversible error for refusing to strike so much of the answer of the defend-

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ant as was not responsive to the twelfth interrogatory. So far as we can judge, as the only count upon which the case was tried is not before us, the answer was pertinent, and whether responsive or not it should not have been stricken.—*Sullivan Timber Co. v. L. & N. R. R. Co.*, 163 Ala. 134, 50 South. 941, wherein the cases of *First Nat. Bank v. Leland*, 122 Ala. 289, 25 South. 195, and *Garrison v. Glass*, 139 Ala. 512, 36 South. 725, were expressly overruled.

Since the record does not disclose count 4, the only one under which this case was tried, we cannot review the action of the trial court in ruling upon the evidence or in giving or refusing charges.

The judgment of the circuit court is affirmed.

Affirmed. All the Justices concur, except DOWDELL, C. J., not sitting.

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Failure to Deliver Freight.

(Decided November 21, 1911. 56 South. 714.)

1. *Carriers; Live Stock; Non-Delivery; Excuse.*—Where a shipper contracted for the transportation of certain cattle and a horse in one car, but the shipment of the cattle was prevented by a legal quarantine, and the shipper refused to permit the horse to be shipped separately, he could not recover against the carrier, for a failure to deliver the horse at destination.

2. *Same; Action; Form.*—Where the carrier was unable to ship the stock to destination on account of a legal quarantine, whereupon, the carrier shipped them back to the original shipping point, and tendered them to the shipper who declined to receive them, and directed the carrier to do whatever it saw fit with them, and the carrier sold the stock, and held the money for the shipper, the shipper could not recover as for a conversion of the stock, at the original shipping point.

3. *Same; Right of Action.*—Where stock was shipped, but on account of a legal quarantine, could not be sent through to destination, and the shipper directed that the stock be returned to the

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original shipping point, from an intermediate point, he was not entitled to recover from the carrier for their conversion at such intermediate point.

4. *Same; Connecting Carrier; Failure to Receive; Duty of Initial Carrier.*—Where a connecting carrier refuses to receive live stock, or other freight, it is the duty of the initial carrier to notify the consignor, so as to enable him to give further shipping directions, unless the freight is of such a perishable nature that it would probably be injured by taking of time necessary to give such notice.

5. *Damages; Evidence; Contract of Carrier.*—Where it appeared that the carrier was not liable for a non-delivery, it was improper to permit proof of value of the property at the intended destination.

6. *Same.*—Where the conversion of the stock by a carrier occurred at an intermediate point, if it occurred at all, it was improper to admit evidence of the value of the stock at the point of final intended destination.

7. *Appeal and Error; Harmless Error; Evidence.*—Where the value of the stock at the point of final destination was greater than at an intermediate point, where the conversion occurred, if at all, the admission of evidence as to the value at such point was prejudicial, especially where it appeared that the value at destination was higher than at the intermediate point, or the original point of shipment.

APPEAL from Lauderdale Circuit Court.

Heard before Hon. C. P. ALMON.

Action by R. L. Wallace against the Southern Railway Company, for failure to deliver stock at point of destination. Judgment for plaintiff and defendant appeals. Reversed and remanded.

C. E. JORDAN, for appellant. A contract in violation of a criminal law cannot be made the basis of a recovery.—*W. U. T. Co. v. Young*, 138 Ala. 240; *Youngblood v. B. T. & S. Co.*, 95 Ala. 526; *W. U. T. Co. v. Walters*, 139 Ala. 652; *Boyette v. S. C. & O. Co.*, 146 Ala. 554; *McNeel v. Dunham*, 95 Am. St. Rep. 641. The Federal statutes prohibit interstate shipments of cattle at certain seasons.—10 Fed. St. Ann. 34, et seq. It becomes the duty of the shipper to obtain the necessary certificate and permission from the proper Federal authorities.—104 S. W. 778. The court erred in permitting value

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to be shown at Memphis, the point of destination.—*Rodgers v. King*, 155 Ala. 544; *Davis v. Hurt*, 114 Ala. 146.

JOSEPH H. NATHAN, and A. E. WALKER, for appellee. A shipper may change or countermand his shipping directions at any time before delivery at point of destination, and if such re-delivery can be made without too much inconvenience or expense to the carrier, it must be done.—2 Hutch. on Carriers, secs. 660 and 735; *Melburn, et al. v. L. & N.*, 88 Ala. 448; *Deech v. Walker*, 14 Mass. 499. The carrier was guilty of conversion.—22 L. R. A. (N. S.) 1170. It was the duty of the carrier to notify consignor of the refusal of the connecting carrier to receive the goods, and ask for other instructions.—Sec. 6138, 6139, Code 1907. The general rule as to measure of damages in cases like the present will be found stated in 6 Cyc. 530.

MAYFIELD, J.—The facts of this case are, in short, and substantially, as follows: Appellee, a live-stock man, delivered to appellant, as a common carrier, on the 7th of January, 1910, 72 head of cattle and 1 stallion, to be carried for hire from Florence, Ala., to McMullen, Mo. The shipment was transported to Memphis, Tenn., by appellant, where the cattle had to be delivered to the next connecting carrier, the Frisco Line, which was shown to be the only connecting carrier to which delivery could be made. The Frisco Line declined to receive the shipment on account of federal quarantine regulations which prohibited shipments of live stock from Alabama to Southern Missouri, the contemplated destination of this shipment. The shipper being present, and knowing of the refusal of the connecting carrier to receive or transport the shipment, without giving any specific instructions to the carrier,

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went on to Van Duesen, Mo., with a promise, as he claims, that he would have the government man or the Frisco people deliver the stock to the shipper. The shipper also testified for him in this connection as follows: "I gave him my address and left. He asked me what to do with it (the shipment) in case he could not get it through. He said he would send it back to Florence. I objected to its being shipped back there. I told him, in case he could not get it through, to send it to St. Louis for immediate slaughter."

Mr. Gray, agent for the Southern Railway Company, as to the same transaction, testified as follows: "Shipment remained at Memphis in the H. T. Bruce stock pen from January 11th, at 9:30 a. m., to January 13th, at 11:00 a. m., and was cared for, watered, and fed, by H. T. Bruce & Co. at the expense of the owner. Cannot advise the length of time R. L. Wallace remained with the shipment in Memphis. Mr. Wallace was notified by myself personally that shipment in question could not be moved into the quarantined district of Missouri, from Florence, Ala., on account of his negligence in not obtaining from the inspector in charge of the quarantined district of Missouri proper certificate and permit allowing the entrance into said quarantined district. Mr. Wallace stated to me that he would go on to McMullen, Mo., and permit the cattle and horse to remain in possession of the carrier, declining to give me any definite instructions as to the disposition of the shipment. I do not know personally whether his intention in this respect was carried out or not, and whether the shipment was actually abandoned by him or not. The federal authorities permitted us to send the shipment back to Florence."

T. C. Rollins, agent of the stockyards at Memphis, testified as to the same matter as follows: "I knew this

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shipment of cattle and the horse were reshipped to Florence, but I do not know by whose order. The railroad company—that is, the Southern Railway—suggested to R. L. Wallace that he allow them to ship the stallion on to destination. At first he talked as if he would consent to this, but he finally directed Mr. Gray, the agent of the Southern Railway at Memphis, to send the whole shipment back to Florence, Ala. I know that Mr. Wallace, the owner, was informed by the United States quarantine officer that the cattle would not go on to destination. The owner, R. L. Wallace, remained in Memphis for about one day after the shipment arrived, and then left, saying he was going to Florence, Ala. I have never seen anything more of him since. Mr. Wallace told me that he knew there was a quarantine against cattle going to McMullen, Mo., before he made the shipment, but the railroad company in Florence told him the shipment would go through all right."

The shipment was carried back to Florence, and there tendered to the shipper, who declined to receive it unless the carrier would pay him \$500 damages, and stated to the carrier's agent that unless that was done he would not receive the shipment, and that the carrier could make such disposition of the shipment as it saw fit.

The complaint contained a great number of counts, but the plaintiff finally eliminated all except counts 6, 7, and 9, which were in code form. Counts 6 and 7 were in trover, for conversion of the shipment, one claiming as for the cattle and the other as for the horse, while count 9 was for the failure to deliver the horse.

The contract in question—whatever it may have been originally—being for the shipment of the cattle and the horse as one lot, and in one car, and shipment of the cattle being made impossible because in violation of

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law, and plaintiff declining to allow the horse to be shipped separately (as shown by the testimony of Collins, which was not denied by plaintiff), under the undisputed evidence there could be no recovery under the ninth count.

There could be no recovery as for a conversion at Florence under counts 6 and 7, because the undisputed evidence shows that the carrier tendered the stock to the shipper and he declined to receive it, and directed the carrier to do whatever it saw fit, upon which the carrier sold the stock and held the money for the plaintiff—which was all that it could do.

This the plaintiff seems to concede, but he insists that the conversion occurred in Memphis, and upon this theory had the defendant's evidence excluded, as to what occurred after the shipment was returned to Florence, except that as to the bare fact of tender.

Touching whether or not there was a conversion of the stock at Memphis, most of the evidence in favor of the plaintiff was disputed. If the defendant's evidence was true, the plaintiff directed that the stock be shipped back to Florence in case it could not be sent to the intended destination. If this was the truth of the matter, there was no conversion in Memphis, and the court should not have excluded the evidence as to the transactions and conversations between the parties after the shipment arrived in Florence, upon the theory that the conversion had already occurred in Memphis, and that these conversations and transactions were thereafter incompetent and irrelevant.

It was likewise error, for the reason above shown, to allow the plaintiff to make proof of the value of the stock in Missouri, the point of intended destination, because, as we have shown, there could be no liability for failure to deliver, and none was sought to be fixed, as to the cattle.

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As the conversion occurred in Memphis, if at all, evidence of the value of the stock in Missouri was not admissible for any purpose, and, it appearing that the value there was greater than in either Memphis or Florence, it is affirmatively shown to have been injurious to the defendant.

"Like every other person, the carrier is bound, both by duty and necessity, to respect and yield to the paramount public authority in power at the place where his undertaking is to be performed. If, therefore, without his fault or neglect the goods are lost or injured by the act or mandate of the public authority, the carrier should be excused, and such is the rule of law. If the goods, without his fault, are or become obnoxious to the requirements of the police power of the state, and are injured or destroyed by its authority, as in the case of the seizure or destruction of goods infected with contagious diseases, or of intoxicating liquors intended for use or sale in violation of law, the carrier cannot be held liable."—Hutchinson on Carriers, §§ 324, 325.

"Where plaintiffs shipped certain cattle and horses in the same car, and the carrier negligently unloaded the cattle in pens, by reason of which they were exposed to Texas fever, whereupon the connecting carrier refused to accept the cattle for shipment to their destination, but offered to ship the horses, which plaintiffs refused, they were not entitled to recover against the initial carrier for delay in shipping the horses, occasioned by their requirement that both horses and cattle should be shipped together."—*Missouri, K. & T. Ry. v. Wells*, 22 Tex. Civ. App. 255, 54 S. W. 939.

As the case must be reversed for the reason assigned, it is unnecessary to pass upon other questions, especially those of variance, and that, as to whether there can be a recovery as for conversion in Memphis, because that question is not properly presented on this appeal.

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As to the duty of the initial carrier when the connecting carrier declines to receive the goods for further shipment, this court, in the case of *L. & N. R. R. Co. v. Duncan & Orr*, 137 Ala. 455, 34 South. 990, a case similar to this, said: "On the state of facts existing with reference to this consignment after the car had reached Montgomery, and the Plant System had refused to accept it for carriage to Greenville, if that company did so refuse—and on this issue it seems to us that the evidence was all with the defendant—it was the defendant's duty to give notice of that fact to the consignors to the end that they might give further directions as to routing the consignment, unless the property was of such perishable nature as that the time necessary to give such notice and to receive such instructions would have caused a delay in forwarding calculated to injure or destroy it. We do not find on the evidence in this record that any such delay would have been entailed by taking the time necessary to these ends, or, at least, we may say that, with this issue properly in the case, it would be open to the jury to find that the defendant was remiss of its duty in this connection. Live stock is, of course, perishable in a general sense; but we apprehend that horses and mules released from the car and in a pen in Montgomery, as these were, were in no danger of perishing while the defendant was communicating with the consignors at Birmingham and receiving their reply."

Reversed and remanded. All the Justices concur.

[*Jones v. Alder.*]

Jones *v.* Alder.

Breach of Lease Contract.

(Decided November 21, 1911. 56 South. 577.)

Parties; Joinder; Contracts.—Where the contract alleged was that the defendant had agreed with plaintiff and another, to place a stable rented to them in first class repair, and that by reason of defendant's failure to repair a horse of plaintiff was seriously injured, etc., the complaint was demurrable for a failure to join, the co-contracting party as a party plaintiff.

(McClellan, J., dissents.)

APPEAL from Jefferson Circuit Court.

Heard before Hon. A. O. LANE.

Action by Mrs. Inez B. Jones against Ike Adler. Judgment for defendant on demurrer, and plaintiff appeals. Affirmed.

The complaint is as follows: Count 1: "Plaintiff claims of the defendant \$2,000 as damages, for that heretofore, plaintiff being a party to said contract of lease by which defendant leased plaintiff and her mother one stable No. 1520 Second avenue for occupation by them as a stable, in Birmingham, Ala., defendant in said lease agreed to put floors, fencing in said building, in first-class repair, and it became and was the duty of defendant so to do; but, notwithstanding said duty, the defendant so negligently conducted itself in that regard that the floor of said building was not put in first-class repair, and as a proximate consequence thereof a stallion, the property of the plaintiff, was severely hurt [here follows catalogue of injuries], and plaintiff was put to great trouble, inconvenience, and expense in or about her efforts to heal and cure said wounds and said injuries." Count 2 is the same as 1,

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except that it is averred that the defendant so negligently conducted himself in that regard that the floor, fencing, and front of said building were not put in first-class repair, and concludes as does count 1.

After demurrers sustained to the first count, it is amended as follows: "Defendant in said lease agreed on, to wit, August 1, 1906, for a valuable consideration, to put the floors, fencing, and front of said building in first-class repair, and it became and was the duty of the defendant so to do within a reasonable time, and not to cause or allow said stable to be or become highly dangerous to plaintiff's horse kept in said stable, by reason of said floor not being put in first-class repair; but, notwithstanding this duty, defendant so negligently conducted himself in that regard that the floor of said building was not put in first-class repair within a reasonable time, and the defendant thereby negligently allowed or caused said floor to be or become highly dangerous to plaintiff's horse kept in said stable, and as a proximate consequence thereof." This count begins and closes as original count 1.

The third count, added by way of amendment, is the same as the amended first count, except as to the allegation of lease, which is as follows: "Defendant leased the plaintiff and another, not as partners, but as individuals, for occupation by them as a stable, and not otherwise, for and during a time of 12 months, to wit, from August 1, 1906, to August 1, 1907, the following premises," etc.

The point in the demurrer was that the necessary parties plaintiff were not joined; it appearing that there are two parties with whom the lease contract was made, and the cause of action was entire and joint; and other causes were as to the insufficiency of the allegation of the breach of duty.

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BOWMAN, HARSH & BEDDOW, for appellant. The court erred in sustaining demurrers to the complaint, as the lease was executed to the two parties as individuals and not as partners, the damage occurring to the property of an individual, and not being a breach of the lease itself, but a consequence flowing from the breach.—*Masterson v. Phinizy*, 56 Ala. 336; *Burden v. Henry*, 90 Ala. 281.

ULLMAN & WINKLER, for appellee. Both parties to the contract should have been joined in a complaint on the contract.—*Masterson v. Phinizy*, 56 Ala. 336; *Smith v. Mutual L. & T. Co.*, 102 Ala. 284; *Painter v. Munn*, 117 Ala. 338. The complaint is in form ex contractu.—*Mobile L. I. Co. v. Randle*, 74 Ala. 170; *Wilkerston v. Mosely*, 18 Ala. 288; *Baldwin v. K. C. M. & B.*, 111 Ala. 515; *Tallassee F. M. Co. v. Western Ry.*, 23 South. 136; *Sharp v. Nat. Bank*, 7 South. 106. The plaintiff should have brought the suit in the name of the two tenants, for the use and benefit of the one who suffered the injury.—*Weeden v. Jones*, 106 Ala. 340; *Strickland v. Burns*, 14 Ala. 511.

SIMPSON, J.—This action is by the appellant for damages on account of injury to a horse, which, it is claimed, resulted from the failure of the defendant to place suitable floors in a stable which had been leased by the defendant “to plaintiff *and another*.” In other words, the action is brought by only one of the contracting parties, and the questions raised by the assignments of error relate only to the action of the court in sustaining demurrers to the several counts of the complaint. It will be noticed that each of the counts of the complaint rests upon the failure of the defendant to do what he had contracted to do, and not upon the omis-

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sion of any duty implied or growing out of the relations between the parties. The counts are all on the contract, and not in case.—*Wilkinson v. Moseley*, 18 Ala. 288; *Mobile Life Insurance Co. v. Randall*, 74 Ala. 170; *Baldwin v. K. C., M. & B. R. R. Co.*, 111 Ala. 515, 20 South. 349.

It matters not whether the plaintiffs were partners or not. The contract set out in the complaint was made with them jointly, and there is no intimation of a separate agreement of lease with each of them, or of any severable interest in either. The only right that both or either of them had to demand that the floors be put in was solely by virtue of the contract, and not on account of any duty otherwise owed. “Where a promise is made to two or more persons jointly all the obligees must unite as plaintiffs. This rule is not affected by the fact that some of such obligees have no real beneficial interest in the recovery.”—15 Ency. Pl. & Pr., pp. 528-530; *Boyd & Walk v. Martin & Bolling*, 10 Ala. 700; *Gayle et al. v. Martin et al.*, 3 Ala. 593, 598; *Miller v. Garrett*, 35 Ala. 96, 100; *Masterson v. Phinizy*, 56 Ala. 336, 339. In the case last cited, this court, speaking through Brickell, C. J., said: “The covenant or obligation is joint, or joint and several, or several, according to the nature of the interest disclosed within its *four corners*. The action must follow the nature of the interest. There is no right of election in the obligees, to sue upon it severally or jointly, because of the damages resulting from its breach.” Also that, to authorize a several suit, “it must be manifest that it was intended a separate and distinct duty should arise to each of them” (56 Ala. 339); and again, that “the averment that the appellee alone has sustained damage cannot change the character of the obligation, or the nature of the interest it creates,” etc. (56 Ala. 340).

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The decision in the case of *Burton v. Henry*, 90 Ala. 281, 286, 7 South. 925, 926, is based distinctly on the principle that the contract "shows upon its face distinct and several rights were intended to be secured," and "very clearly indicated that these separate rights may be separately asserted," and that "the interest of the promisees is not only not joint, but is, in the very nature of things, even aside from the language of the instrument, adverse each to the other, and the proceedings provided for by the agreement, for the effectuation of whatever equities the parties respectively had."—90 Ala. 286, 7 South. 926. In the case of *Smith et al. v. Mutual Loan & Trust Company et al.*, 102 Ala. 282, 285, 286, 14 South. 625, 626, although the bond gave a right of action "to any person" damaged by the dissolution of the injunction, yet this court held that the suit should be brought in the name of the payees for the use of the person injured. To the same effect is the case of *Painter et al. v. Munn et al.*, 117 Ala. 323, 338, 23 South. 83, 67 Am. St. Rep. 170.

There was no error in sustaining the demurrer to the several counts of the complaint. The judgment of the court is affirmed.

Affirmed.

DOWDELL, C. J., and ANDERSON, SAYRE, and SOMERVILLE, JJ., concur. McCLELLAN, J., dissents, on the ground that the counts are in case, under the rulings in *White v. Levy*, 91 Ala. 175, 8 South. 563, and *Western Union Telegraph Co. v. Krichbaum*, 132 Ala. 535, 31 South. 607. MAYFIELD, J., also thinks that the counts are in case, but concurs in the conclusion, because he thinks the parties would have to join in either event; the tort depending on the contract.

[Evans v. Alabama-Georgia Syrup Co.]

Evans v. Alabama-Georgia Syrup Co.*Personal Injury Action.*

(Decided November 23, 1911. 56 South. 529.)

Pleading; Conclusion; Contributory Negligence.—Where the action was for injury to plaintiff caused by falling down an elevator shaft, and the complaint alleged the existence of a dangerous opening, and the failure of the defendant to warn plaintiff of the existence thereof, to guard the opening, and to keep the premises in a reasonably safe condition, a plea alleging that plaintiff proximately contributed to the injury, in that he negligently stepped into the opening causing the injury, was a conclusion of the pleader, and subject to demurrer on that ground.

(Sayre, J., dissents.)

APPEAL from Montgomery City Court.

Heard before Hon. WILLIAM H. THOMAS.

Action by L. B. Evans against the Alabama-Georgia Syrup Company for damages for personal injuries. From a judgment for defendant, overruling demurrers to pleas, plaintiff appeals. Reversed and remanded.

The following pleas are referred to in the amendment: Plea 2: "For further answer to the complaint, and separately and severally to each count thereof, this defendant says that the plaintiff proximately contributed to the injury of which he complains, in that while in said building he negligently or carelessly stepped into the alleged hole or opening, thereby causing the injury of which he complains." Plea 3 (to each count separately and severally): "That the plaintiff proximately contributed to the injury of which he complains in this: That the hole or opening into which he fell was an elevator shaft or opening constructed by the defendant and used in the operation, management, and conduct of its said business. That said elevator shaft or opening was in a large and well-lighted building, and

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easily seen by persons or parties therein, exercising reasonable care. And defendant avers that plaintiff while in said building in the daytime, and while said building was well lighted—the said elevator shaft or opening could, by the exercise of reasonable care, have been easily seen and avoided—negligently or carelessly walked or stepped into said opening or hole, and thereby caused the injury of which he complains.” Plea 4 (to each count separately and severally): “That the hole or opening into which plaintiff is alleged to have fallen was the elevator shaft or opening constructed by defendant for and in use in a private warehouse or storeroom of defendant, and near the rear end thereof. That said warehouse was well lighted when the alleged injury occurred, and said elevator shaft could have been easily seen and avoided by any one using due and reasonable care; and defendant avers that the plaintiff while in said building failed to exercise reasonable or ordinary care to avoid the said shaft or opening, and carelessly walked or stepped into the same, and thereby and as a proximate consequence thereof received the injury of which he complains.” The first count alleged the existence of the dangerous hole or opening, and the failure to warn plaintiff of its existence. The second count alleged the duty on the defendant to guard or secure the approach to the hole. The third count alleged the duty of the defendant to use proper diligence in keeping the premises in reasonably safe condition, and its failure to do so. The other counts amplify the first three.

HILL, HILL & WHITING, for appellant. Plea 2 was bad and the court erred in overruling demurrers thereto.—*B. R. L. & P. Co. v. Lee*, 153 Ala. 79; *So. Cot. O. Co. v. Walker*, 51 South. 169; *W. Ry. of Ala. v. Russell*,

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144 Ala. 153; *Osburn v. Ala. S. & W. Co.*, 135 Ala. 573; *Ala. Chem. Co. v. Niles*, 156 Ala. 298; *Johns v. L. & N.*, 104 Ala. 241; *Brent v. Baldwin*, 160 Ala. 635; *M. & K. Ry. Co. v. Brombray*, 141 Ala. 275; *Markee v. L. & N.*, 103 Ala. 160; *R. R. Co. v. Henderson*, 100 Ala. 451.

STEINER, CRUM & WEIL, for appellee. While it is our insistence that plea 2 was good, yet if it be considered bad, there were other pleas of contributory negligence, in which the facts are set forth, and under which evidence of contributory negligence was pertinent, and in the absence of a bill of exception, the court will presume that no evidence was permitted in support of the plea, but such as would tend to establish contributory negligence. Hence, no prejudicial error was committed.

—*First Nat. Bank of Gadsden v. Steiner, Lobman & Frank*, 53 South. 172; *Horan v. Gray & Dudley Hdw. Co.*, 159 Ala. 159; *W. Ry. of Ala. v. Russell*, 144 Ala. 142; *First Nat. Bank of Anniston v. Cheney*, 114 Ala. 137; *Pope v. Glenn Falls I. Co.*, 136 Ala. 670; *State v. Brantley*, 27 Ala. 44; *L. & N. R. R. Co. v. York*, 128 Ala. 305; *Terrell C. Co. v. Lacy*, 31 South. 109; *Andrews v. Hall*, 132 Ala. 320; *Cross v. Eslinger*, 133 Ala. 409; *Barton v. Engine Co.*, 154 Ala. 275.

SAYRE, J.—All the Judges, except myself, concur in the opinion that the second plea was bad as being a mere conclusion of the pleader, and that the judgment ought to be reversed for error in overruling the demurrer to that plea. They cite *T. C. I. Co. v. Herndon*, 100 Ala. 451, 14 South. 287; *Osborne v. Ala. S. & W. Co.*, 135 Ala. 571, 33 South. 687; *So. Ry. v. Shelton*, 136 Ala. 191, 34 South. 194; *So. Ry. v. Hundley*, 151 Ala. 378, 44 South. 195. I dissent. In my judgment the pleas numbered 3 and 4 are no better in any respect than plea 2,

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and they all alike submitted to the jury a perfectly intelligible and meritorious issue of fact. It cannot be true in every case that a plea of contributory negligence must aver a state of facts to which the law attaches the conclusion of negligence. "The judge has to say whether any facts have been (averred and) established by evidence from which negligence *may be* reasonably inferred; the jurors have to say whether, from those facts, when submitted to them, negligence *ought to be inferred*."—Pollock on Torts, 365 (parenthesis supplied). In many cases the question whether due care and caution have been used is, in the nature of things, a question of fact, and this, though the evidence be without conflict. In every case, unless it be a case where res ipsa loquitur, the pleader must allege facts and in allegation draw the conclusion for which he contends. I think our cases have recognized these principles.—*Lord v. Mobile*, 113 Ala. 360, 21 South. 366; *West v. Thomas*, 97 Ala. 622, 11 South. 768. I can find no essential difference between the plea held bad and those held good except that in the latter the so-called mere conclusion is covered by a mass of verbiage while the gist of all of them is the same. It is that the plaintiff negligently stepped into the hole described in the complaint. To require the defendant to aver every element contained in the situation would be to impose upon it an impossible task. And if the defendant had been able to reproduce in averment every detail of the situation, it would still have been for the jury to say whether plaintiff had been guilty of contributory negligence. The office of the plea is to inform the plaintiff of the facts relied on in bar of the action stated in the complaint. Plaintiff, having been by implication invited upon the premises, had a right to assume that a pitfall had not been left in his way. Therefore a plea averring that he had failed

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to look for the hole into which he fell, and so had stepped into it, would have been bad as imposing upon him the duty to look for the hole. And yet he could not walk as one blindfolded. It was his duty, notwithstanding the presumption of safety which he might indulge, to look about him as a man of reasonable prudence will in every place and under all circumstances. Whatever the place and whatever the circumstances, it was his duty to exercise a general care for his own safety. If there was anything to be seen, heard, or otherwise known by the senses exercised with reasonable prudence, though not bent upon the discovery of the particular peril into which he fell, it was his duty to know it; and if his failure to know contributed proximately to his injury, he cannot recover. How, then, can a failure to exercise this general care be averred except in a general way? To aver that the hole could have been seen and avoided by a person exercising reasonable care and that the plaintiff negligently stepped into it, as was the manner of averment adopted in other pleas, would seem to be an averment of everything necessary to a good plea. And yet such a plea does not meet the objection taken by the demurrer any more satisfactorily than does the form of averment adopted in plea 2. The fact seems to be that, while both forms of averment are in part conclusions not ordinarily permitted in the allegation of matters of defense, they do state, as nearly as is possible in the reasonable use of language, the ultimate fact upon which the defendant was entitled to rest a valid defense—that the plaintiff stepped into the hole, whereas its character and surroundings were such that no prudent man would have done so even though the hole was unguarded and he without warning of its presence. The court could not have otherwise stated the case to the jury. It was, therefore, under the peculiar

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circumstances of this case, only necessary to state that plaintiff did an act which contributed to his injury, and to characterize that act as negligently done. This plea 2 did. The rest did no more.

Other members of the court direct me to state also their conclusion that the error which they find was not cured by other parts of the record.

Reversed and remanded. All the Justices concur, except SAYRE, J., who dissents.

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Death from Defect of Street.

(Decided November 21, 1911. 56 South. 723.)

1. Municipal Corporation; Defective Street; Action; Complaint.—Where the action was against the city for the death of a child caused by permitting water to flow along a street in such quantity, and with such force as to carry the deceased into the mouth of a sewer pipe negligently left open, an averment in the complaint that the city negligently allowed the street to become in a dangerous condition, was a sufficient allegation of implied or constructive notice thereof to the city authorities.

2. Same; Defenses; Plan.—Where the action was against a city for the death of a child caused by the negligence of the city in permitting water to flow into the street in such quantities, and with such force as to sweep decedent into the mouth of a sewer left open, the city cannot escape liability on the ground that the accident was the result of a defective sewer plan, where it appeared that there was a palpable lack of skill in constructing the sewer, which should have been appreciated by men of ordinary understanding, or where its unfitness had been demonstrated by previous experience.

3. Same; Duty of Corporation.—While the municipality is not bound to provide an underground sewer system, yet, having undertaken to provide such a system, it becomes its duty to see that a proper one is provided which will not leave the street in a dangerous condition.

4. Same; Evidence.—Where the action was against a city for the death of a child caused by a defective sewer, it was not competent to show that other well regulated cities followed the same plan in constructing sewers.

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5. *Same; Parties.*—Where the action was begun against the mayor and aldermen of the municipality, and pending the suit and before judgment, section 1046, Code 1907, was enacted, judgment was properly rendered against the defendant, as named in the complaint, under the provisions of section 1050, Code 1907.

6. *Death; Action For; Right to Recover.*—The administrator of the estate of a deceased child may recover damages for its death, although the parents or other persons having control of the child were guilty of contributory negligence.

7. *Same; Action by Administrator; Statute.*—Where the right of action for the death of a child arose prior to the adoption of the Code of 1907, action therefor might be brought by the personal representative under section 26, Code 1896, though the infant left parents surviving him, upon whom section 2485, Code 1907, conferred the right to sue, since it is provided in the act adopting the Code of 1907, that its adoption should not affect existing rights.

8. *Evidence; Opinion Evidence.*—In an action against a municipality for the death of an infant drowned in an alleged defective sewer, expert testimony that the sewer system as provided was reasonably safe, was inadmissible as usurping the functions of the jury.

APPEAL from Birmingham City Court.

Heard before Hon. C. W. FERGUSON.

Action by Hugh C. Crane, as administrator of the estate of Lloyd Kerr, deceased, against the City of Birmingham. From a judgment for plaintiff, defendant appeals. Affirmed.

The complaint is as follows: Count 1, as amended: "Plaintiff, who sues in his capacity as the administrator of Lloyd Kerr, deceased, claims of defendant mayor and aldermen of Birmingham, a municipal corporation under the laws of Alabama, the sum of \$20,000 damages, in this: That on or prior to the 29th day of September, 1902, defendant had committed to its care and keeping the public streets and sidewalks of the city of Birmingham, and was in duty bound to exercise reasonable care to keep said streets and sidewalks in a reasonably safe condition for persons passing along and over same. That on, to wit, the date aforesaid, plaintiff's intestate, who was an infant under seven years of age, was on one of the public streets of said city, to wit, on

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Twenty-Fifth Street North, near where said street intersects with Third alley, and, while being on said street, was borne or carried by water thereon into one of the sewers of said city, and drowned. That plaintiff's said intestate's death was proximately caused by the negligence of said defendant in allowing said street to be out of repair, in this: That water was allowed to accumulate on and run over and along said street, or a part of the same, in a large quantity, viz., such quantity and with such force as to propel or convey plaintiff's said intestate along and over said street, into said sewer, causing his death by drowning, etc. And plaintiff avers that defendant had notice that said street was out of repair as above stated." Then follows an allegation of the presentation of the claim to the mayor and board of aldermen and disallowance of same. 2, As amended: Same as 1, down to and including the words "reasonably safe condition," where they first appear in said count, and adds: "That defendant, neglecting this duty in its behalf, on, to wit, the date aforesaid, negligently allowed large quantities of water to accumulate on Twenty-Fifth street, near where said street intersects with Third alley, and to flow with great force along said street, and into the mouth of one of the sewers of the said city, near the intersection of said street with said alley, and negligently permitted the mouth of said sewer into which said water flowed to be and remain open, so that a child could be carried or borne by the water on said street into said sewer. And plaintiff avers that while his intestate, a child under seven years of age, was in said water on said street on the date aforesaid, he was carried with great force by said water into the mouth of said sewer and drowned." Then follows the same averment of notice of the defect, and presentation and disallowance of claim, as in count 1. The

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demurrsers raise the proposition that the counts did not aver sufficient knowledge of the defects on the part of the defendant, or notice to the defendant of the defects; that, if there was negligence, it was in the exercise of its governmental functions, for which the defendant was not liable; that, if there was negligence, it was in the adoption of a plan of drainage and sewerage, for which the defendant was not liable. It alleges negligence of the defendant in maintaining a street or sewer in a certain condition, but does not aver or show that said street or sewer was maintained in any other condition than that contemplated in the original plan of defendant for the improvement of said street and construction of said sewer. It shows on its face that the defendant maintained the street and sewer complained of in the same condition as originally contemplated in the plans of defendant.

The amendments to the counts consisted in adding the words "to exercise reasonable care" just after the words "was in duty bound," where they occur in said counts. To the amended counts the following demurrsers were interposed, in addition to those above set out: "(1) The counts do not aver or show that the street which is alleged to have been out of repair at the time of the accident to plaintiff's intestate had ever been established and improved in such manner as to make the defendant liable for failure to keep the same in good condition. (2) Said counts are inconsistent and repugnant, in that negligence is alleged therein as the conclusion of the pleader, yet the facts stated therein show that the mayor and aldermen of Birmingham were not guilty of negligence. (3) It is not negligence for defendants to allow water to accumulate on or run over and along said street, or a part thereof, in the quantity stated in said count. (4) It is not averred or shown

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that the water accumulated or run over and along said street, or a part thereof, as set out in said count, was not run over or along a drain or sewer provided for such purpose."

Defendant filed the plea of the general issue and the following special pleas: (2) "To each count defendant says that the accident and death of plaintiff's intestate would not have happened, but for the proximate contributory negligence of the father of plaintiff's intestate, who had custody and control of him at said time, which said proximate contributory negligence consisted in this: That the said father of plaintiff's intestate negligently permitted plaintiff to wade in a drain in said street while water was flowing down the same into the mouth of an open sewer, and plaintiff's intestate was thereby washed into said open sewer, and drowned." (3) Same as 2, except that the contributory negligence is alleged to be that of the mother, instead of the father. (4) Same as 2, except the contributory negligence is alleged to be that of a person unknown to the defendant, who had custody and control of plaintiff's intestate at the time. (5) "To each count of the complaint says the plaintiff's intestate, at the time of being washed into said sewer in said street as set out in the complaint, was wading in water in a drain in said street which flowed into said sewer; that said sewer was constructed and left open, and said drain was constructed to accumulate the waters and convey them into said sewer, as set out in said complaint, according to a plan adopted by the mayor and aldermen of Birmingham in its governmental capacity for the drainage of the city of storm water; that said drain and sewer were constructed strictly in accordance with said plan; and that there was no negligence on the part of the defendant, its officers, agents, or servants, in leaving open the

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mouth of said sewer as aforesaid, or in the construction of said drain as aforesaid, but that the same was constructed in a skillful manner, and in accordance with said plan, and was maintained in accordance with said plan." (6) Same as 5, except it is alleged that the sewer was constructed by the city in the exercise of its governmental capacity. (A) Sets up that the minor was less than seven years old at the time of its death; that the plaintiff, as administrator of said minor, had no right to maintain this action, because it says that at the time said action was brought, and at the present time, the parent or parents of said minor were and are living, and the right of action for the death of said minor is in the said parent or parents, and not in the personal representative; and that Hugh C. Crane, who now sues as administrator, is not the parent of said child.

ROMAINE BOYD, for appellant. The court erred in overruling defendant's demurrer to the 1st count.—28 Cyc. 1370; Elliott on Roads & Streets, secs. 473-4; Id. 631. On the same authorities, the court erred in overruling demurrs to the 2d count. The court erred in sustaining plaintiff's demurrer to defendant's plea A, as to the 1st and 2nd counts.—Sec. 26, Code 1896; Sec. 2485, Code 1907, and authorities cited. The court erred in sustaining demurrs to the 2nd plea, also to the 3rd and 4th pleas.—*A. G. S. v. Burgess*, 116 Ala. 509; *So. Ry. v. Shipp*, 53 South. 152. The court should have permitted it to be shown that the sewer was properly constructed and such as was in use in other well regulated cities. The court erred in rendering judgment against the mayor and aldermen of the city of Birmingham.—28 Cyc. 680.

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FRANK S. WHITE & SONS, and J. S. KENNEDY, for appellee. The court was not in error in overruling demurrers to the complaint.—*Arndt v. Cullman*, 31 South. 478; *Mayor, etc. v. Lewis*, 92 Ala. 352; *Birmingham v. Starr*, 112 Ala. 98; *Albritton v. Mayor*, 60 Ala. 486. The city is liable for its failure to keep the entire street in a reasonable state of repair, and it was immaterial what caused the defect, if the city was negligent in permitting the same to be out of repair.—*Selma v. Perkins*, 68 Ala. 148; *Montgomery v. Gilmer*, 133 Ala. 116; *Birmingham v. Taylor*, 105 Ala. ... The city cannot protect itself on the ground that it made a mistake and planned its sewer too small.—*Arndt v. Cullman, supra*. The minor was conclusively presumed to be incapable of being guilty of contributory negligence, and neither his nor that of his parents will defeat recovery.—*Tutwiler v. Enslen*, 129 Ala. 346; *Pratt C. & I. Co. v. Brawley*, 83 Ala. 374; *A. G. S. v. Crocker*, 31 South. 561. The court properly sustained objections to the expert testimony and to the fact that other well regulated cities used a similar sewer plant.—*Farley v. Bay Shell Road*, 27 South. 770; *Ross v. The State*, 139 Ala. 144; *Carwile v. Carwile*, 131 Ala. 606; *Tolbert v. The State*, 87 Ala. 27. A personal representative had the same right to recover as the intestate would have had had he not been killed.—Section 2486, Code 1907.—*T. C. I. & R. R. Co. v. Herndon*, 100 Ala. ... Counsel discuss other charges refused, but without further citation of authority.

SAYRE, J.—The two counts of the complaint, so far as concerns the objections taken to them by demurrer, were substantially equivalents of each other and, in respect to the averment of notice of the defect, followed forms which have had the approval of this court.—

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Birmingham v. Pool, 169 Ala. 177, 52 South. 937; *Ensley v. Smith*, 165 Ala. 387, 51 South. 343, and cases cited. The complaint sufficiently avers that the defendant municipality had actual or constructive notice of the defect alleged for such length of time as gave its officers, in the exercise of reasonable diligence, opportunity to make repairs or take other sufficient precautions against the happening of accidents.—*Lord v. Mobile*, 113 Ala. 360, 21 South. 366.

In argument against the sufficiency of the complaint it is stated that the death of plaintiff's intestate appears to have resulted from a defective sewer plan, and it is said that the municipality is not answerable for the consequence of such a defect. In the first count the complaint is that defendant was guilty of negligence in allowing water to accumulate on and run along the street in such volume and with such force as to wash plaintiff's intestate into a sewer where he was drowned. To this, in the second count, is added the averment that defendant negligently permitted the mouth of the sewer to remain unguarded. Appellant's contention in respect to its liability under these conditions is repeated in a number of charges requested by it and refused by the court. It is also expressed in a number of exceptions reserved on the admissibility of evidence. It is unnecessary to treat separately the assignments of error based upon these rulings. By them the defendant invokes that principle of law which relieves a municipal corporation of liability for errors of judgment in the planning and execution of public improvements when its officers have followed the advice of one skilled in such matters and have used due care in the selection of their adviser. Such advice will not, however, excuse where there has been such palpable lack of skill and care as ought to have been appreciated by men of ordinary ex-

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perience and understanding. Nor is it perceived how the principle invoked can avail the defendant in the consideration of the case stated in the complaint and shown by the evidence. However much the defendant may have been advised and may have relied upon that advice in planning its system of drains and sewers, that advice was of no consequence in the presence of the plaintiff's theory, amply sustained in the tendencies of the evidence, which was that, after repeated experiences through a series of years had demonstrated the plan or its execution to be so defective as to render the street at the place in question dangerous, defendant negligently omitted to supply a remedy.—Shearm. & Redf. Neg. §§ 271-275.

Demurrers to the several special pleas, setting up the contributory negligence of the parent or other person having charge and control of plaintiff's intestate, were well sustained, as was decided in the recent case of *Southern Railway Co. v. Shipp*, 169 Ala. 329, 53 South. 152.

Appellant also assigns for error the court's ruling on the sufficiency of plea A. We have been unable to find in the record either demurrer to this plea or ruling on its sufficiency; but, since the same proposition is advanced in some of the charges refused to the defendant and reserved for review we state our opinion that it presented an immaterial issue. The contention seems to be that a personal representative cannot maintain an action for the wrongful death of his intestate, who was a minor, as long as there is a parent surviving. The language of the statute authorizing the action, as it was at the time of the death of plaintiff's intestate and the bringing of this suit (Code 1896, § 26) affords a sufficient answer to this contention. It provided that the parent or the personal representative might sue and recover such damages as the jury might assess. Under

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the statute as amended in the Code of 1907, § 2485, the parent has the better right to sue, and the personal representative may sue only in cases where there is no surviving parent or the parent fails to sue within six months from the death of the minor. But the amendment had no effect upon existing rights or remedies.—Code, § 10. The right of plaintiff in this case is to be determined on the law as it was at the time plaintiff's intestate came to his death. By that law the suit, whether brought by parent or personal representative, sought to enforce a right in favor of the parents. The personal representative, where he sued, acted as a quasi trustee for the parents who had the right to control the suit and direct the disposition of its proceeds. The personal representative in such case was hardly more than a nominal plaintiff; but, under the plain alternative of the statute as it then was, the suit was properly brought in his name.—*White v. Ward*, 157 Ala. 345, 47 South. 166, 18 L. R. A. (N. S.) 568.

Plaintiff's case was this: After a heavy rainfall, water stood over the roadway and sidewalks of defendant's street. On previous occasions a like condition had frequently followed upon heavy rains. A ditch, three or four feet deep, running along the edge of the sidewalk, conducted the water to the mouth of a sewer pipe 18 inches in diameter. On the occasion in question, roadway, sidewalk, and ditch were hidden beneath the accumulated water which spread over them all. Plaintiff's intestate, a child under seven years of age, was wading about the street with other children when he stepped into the ditch, was drawn by the water into the unguarded mouth of the sewer pipe, and was drowned. To this case, and the inferences the jury were free to draw from these facts, it was no answer that the sewer had been constructed under advice of a competent engineer, or that the engineer still thought that the

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sewer was planned and constructed in accordance with the principles of good engineering. The defendant was under no obligation to provide an artificial underground system of sewers. But, having undertaken to provide such a system, it was defendant's duty to see that a proper system was provided—one that would not leave the street in a dangerous condition. The question, then, for decision was whether under the conditions shown the accumulated water, or the accumulated water in connection with the unguarded sewer, sufficiently evidenced negligence on the part of the municipal authorities in the discharge of their duty to keep the street in a reasonably safe condition for the use of those who had occasion to pass along it for business or pleasure. This was an ordinary question of fact for the jury's determination, and no witness, however expert, could properly be permitted to usurp the functions of the jury by expressing his opinion on that subject, for all the elements to be considered in determining the question at issue were open to the common understanding of the jury whose duty it was to draw the conclusion.—*Warden v. L. & N. R. R. Co.*, 94 Ala. 277, 10 South. 276, 14 L. R. A. 552.

The same proposition was presented in a different guise when the defendant sought to have its witness state that well-regulated cities in America followed the plan of constructing sewers shown to have been followed at the place in question. No practice can excuse negligence. The defendant could not avoid responsibility for negligence in maintaining its streets, if the jury found there was negligence, by showing the practice of cities in America or elsewhere in planning systems of drains and sewers, and this, notwithstanding the opinion of the witness that such cities in that respect were well regulated. There was, therefore, no error in the

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court's rulings on questions of evidence, nor in refusing those charges which were requested by the defendant on the subject to which we have just here referred.—*K. C. M. & B. R. R. Co. v. Burton*, 97 Ala. 240-251, 12 South. 88.

This suit was properly brought against the mayor and aldermen of Birmingham, a municipal corporation, and so the defendant is styled in the judgment rendered. Pending the suit and before judgment the Municipal Code Law of August 13, 1907, was passed (Code 1907, § 1046 et seq.), providing that all municipal organizations should be bodies politic and corporate, having perpetual succession, "under the name now used or hereafter assumed, * * * and each under such name as the 'City of —,' or 'Town of —,' as the case may be, shall sue and be sued," etc. There was no amendment of the complaint to meet this change of corporate name, as there might have been. Appellant takes the point that the judgment erroneously followed the summons and complaint in the matter of the name and style of the defendant corporation. The change of name effected no change in the rights or liabilities of the corporation. As for the formal requirements of the judgment in a case prosecuted under the circumstances here shown, that was clearly provided for at the time of the enactment of the Municipal Code Law. The provision was that "all suits then pending in favor of or against municipal corporations shall continue to judgment unaffected by this chapter, and shall be enforced in favor of or against such city or town, as the case may be, notwithstanding a change of name or organization."—Code, § 1050.

After considering those assignments of error which have been argued for the appellant, we have reached the conclusion that the judgment ought to be affirmed.

Affirmed. All the Justices concur.

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Collision Accident.

(Decided January 18, 1912. 57 South. 471.)

1. *Negligence; Violation of Ordinance.*—The violation of an ordinance is negligence per se, and entitles one to damages who has been injured in person or estate as a proximate result thereof.

2. *Same; Contributory Negligence.*—Where the plaintiff violates an ordinance, it may be contributory negligence if it proximately contributed to the injury, provided the ordinance was enacted for the defendant's benefit, and not merely for the public generally, or for a class.

3. *Street Railways; Collision Accident; Contributory Negligence.*—As the ordinance requiring vehicle drivers to keep to the right of the center of the street was not enacted for the benefit of a street car company, though their tracks be in the center of the street, such street car company is not in position to plead contributory negligence on account of the owner being in the center of the street contrary to the ordinance, when sued for damages to an automobile, caused by one of its cars striking it.

4. *Same.*—The driver of an automobile running ahead of a street car was not guilty of contributory negligence in failing to signal the motorman to stop unless such driver knew that the car was approaching.

5. *Same; Accident; Evidence.*—Where the evidence showed that the automobile was being run astride the south rail of the street car track which was twelve feet from the south curb, while the north rail was fifteen feet from the north curb, the automobile was on the right hand side of the center of the street, and an ordinance requiring vehicle drivers to keep to the right of the center of the street became irrelevant and immaterial.

APPEAL from Montgomery Circuit Court.

Heard before Hon. W. W. PEARSON.

Action by Edw. S. Watts against the Montgomery Traction Company. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

The action was for damages to an automobile, caused by the automobile being struck by a car and demol-

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ished; the automobile at the time being run ahead of the car and in the same direction as the car.

Plea 8 is as follows: "Defendant says: That the accident occurred on one of the streets of the city of Montgomery, within the limits of said city. That at said time, and for a long time, there had been an ordinance of the city of Montgomery in force and effect, namely, section 1093 of the City Code of Montgomery, reading as follows: 'Sec. 1093. Any person who willfully fails to keep to that side of the street which is to the right of the driver while driving any vehicle through the streets * * * must on conviction be fined not less than \$1.00 nor more than \$100.00.' That on the day and date of the alleged injuries of the said automobile the same was being driven by one Felder, who negligently and in violation of said ordinance failed to keep to that part of the street on his right, but drove the same along the middle of said street, and in that part of the same where defendant's tracks are located, so that defendant's car could not safely pass same without colliding therewith, and the negligence of said driver of said automobile and violation of said ordinance, to keep to the right of the street, contributed proximately to the injuries complained of in the complaint."

The fifth ground of demurrer was that the ordinance referred to was not passed, according to the averments of said plea, for the benefit of the defendant, or its employees engaged in the business of the defendant.

J. T. LETCHER, for appellant. The driver had as much right to the street as the appellant's street car.—27 A. & E. Enc. of Law, 28. It is not negligence per se for one in charge of a vehicle to drive along or across car tracks which are a part of the public street.—*B. R. & E. Co. v. City Stables*, 119 Ala. 615; *Glass v. R. R.*

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Co., 94 Ala. 518. Hence, demurrer to plea 8 should have been sustained on its first ground, as well as on its 8th, 9th and 10th grounds. The plea was not made good by the general averments of contributory negligence if the facts therein set out were insufficient to show such negligence.—*Osborn v. Ala. S. & W. Co.*, 135 Ala. 571; *So. Ry. Co. v. Branyon*, 145 Ala. 662; *Forbes & Carliss v. Davidson*, 41 South. 312. The plea was also defective because the ordinance set up therein was not enacted for the benefit of defendant, but for the public generally.—29 Cyc. 438; *Frontier S. L. Co. v. Connolly*, 68 L. R. A. 425; *Brember v. Jones*, 26 L. R. A. 408; *Wolf v. Smith*, 9 L. R. A. (N. S.) 343, and note. Some causal connection must be shown between the alleged contributory negligence and the injury.—*Wolf v. Smith, supra*; s. c. 160 Ala. 644. Plea 9 was insufficient because failing to allege that the driver of the vehicle knew of the approach of the car.

RAY RUSHTON and W. M. WILLIAMS, for appellee. The violation of a statute or city ordinance is negligence per se, and is a complete defense to an action for injuries, if a violation of the statute or ordinance proximately contributed to the injury.—29 Cyc. 437; *K. C. M. & B. v. Flippo*, 138 Ala. 487; *Sloss-S. Co. v. Sharpe*, 156 Ala. 284; *Wise v. Morgan*, 44 L. R. A. 548; *Parker v. Barnard*, 135 Mass. 116; 146 Mass. 596; 59 Conn. 1; 64 Am. St. Rep. 44; 37 L. R. A. 591; 23 S. E. 1061. Special plea 8 is sufficient in its allegations.—28 Cyc. 394. The defendant had as much interest in the enforcement of the ordinance as did the driver of any other vehicle, and a plea showing the violation of such ordinance contributing proximately to plaintiff's injury is a complete and conclusive defense.—75 Ill. 93; 42 Am. St. Rep 508; 60 Mo. 475; *Sherman & Redfield on Neg. sec. 13*; 17 L.

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R. A. 588; 85 Am. Dec. 408; 67 Am. St. Rep. 252; see also.—*L. & N. v. Murphy*, 129 Ala. 432; *C. of Ga. v. Sturgis*, 43 South. 96. One who sustains a special and particular injury from an unlawful act prejudicial to the public may maintain an action for his own special injury.—*Gray v. Mobile T. Co.*, 55 Ala. 387. Legislative enactments of this type are construed as creating a duty both to the public and to private individuals, and to liberally interpret the class of persons for whose benefit the law was made.—111 N. W. 279; 135 Mass. 46; 106 Am. St. Rep. 377; 23 S. W. 1061. The court did not err in permitting the ordinance to be introduced in evidence.—47 L. R. A. 548. Plea 9 was a good plea of contributory negligence.—*B. R. L. & P. Co. v. Yates*, 169 Ala. 387.

ANDERSON, J.—The decisions as to the legal effect of violating a statute or ordinance are not harmonious. In some cases it is held that such violation is not negligence per se, but that it is competent evidence of negligence, and may be sufficient to justify a jury in finding negligence in fact.—29 Cyc. 437, and cases cited in note. However, it is settled in Alabama, and we think it is the weight of authority, that a violation of a statute or an ordinance is negligence per se, and a person proximately injured thereby may recover for such injuries against the violator of the law.—*Kansas City R. R. v. Flippo*, 138 Ala. 487, 35 South. 457; *Sloss-Sheffield Co. v. Sharp*, 156 Ala. 289, 47 South. 279; *Wise v. Morgan*, 101 Tenn. 273, 48 S. W. 971, 44 L. R. A. 548; *Parker v. Barnard*, 135 Mass. 116, 46 Am. St. Rep. 450; *Newcomb v. Boston Prot. Dpmt.*, 146 Mass. 596, 16 N. E. 555, 4 Am. St. Rep. 354; *Terre Haute R. R. v. Williams*, 172 Ill. 379, 50 N. E. 116, 64 Am. St. Rep. 44; *Rosse v. St. Paul R. R.*, 68 Minn. 216, 71 N. W. 20, 37 L. R. A. 591, 64 Am. St. Rep. 472.

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We are not cited to and have found no Alabama case where the violation of a statute or ordinance by the injured party was pleaded by the defendant by way of contributory negligence; yet we see no reason why such a violation, if proximately causing the injury complained of, cannot be set up as a defense to the simple negligence charged in the complaint. Such a defense has been approved, and we think properly so, in the cases of *Broschart v. Tuttle*, 59 Conn. 1, 21 Atl. 925, 11 L. R. A. 33; *Weller v. Chicago R. R.*, 120 Mo. 635, 23 S. W. 1061. The statute or ordinance violated, however, must have been enacted for the benefit of the party who seeks to invoke its violation as distinguished from the public generally or a class to whom the ordinance necessarily applies.—29 Cyc. 438; *L. & N. R. R. Co. v. Murphree*, 129 Ala. 432, 29 South. 592; *Cen. of Ga. Rwy. v. Sturgis*, 149 Ala. 573, 43 South. 96.

A municipality would no doubt have the right, under its police power, to regulate the travel upon its streets so as to prevent congestion and collision, and could thereby protect all persons using the streets, including street cars; but it is manifest that the ordinance in question was not intended for the protection of street railways, as the wording and meaning of same does not exclude vehicles from their tracks. The ordinance does not require the drivers of vehicles to keep off of the street railway tracks, but only requires them to keep on the side of the street to the right; that is, they must remain to the right of the center of the street. If they do this, they do not violate the ordinance, notwithstanding they may be upon the track of a street car line. It may be that most of the street car tracks are laid in the center of the street, and an ordinance requiring vehicles to stay to the right of the track, if there is space enough for them to do so, would no doubt be a reasonable one;

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but such is not the present ordinance, as it only requires the vehicle to be to the right of the center of the street. Again, there may be street car tracks laid within either side of the streets, and, if a driver kept to the right of the center of the street, he would not violate the ordinance, although he may drive upon or along the street car track. It is plain that the ordinance in question was not intended to keep vehicles off of street car tracks or for the protection of street car companies.

Plea 8, if not otherwise faulty, was subject to grounds 5, 11, and 12 of the plaintiff's demurrer, and the trial court erred in not sustaining same.

The negligent failure of the plaintiff's agent, Felder, to hollo, warn, or signal the defendant's motorman is a mere conclusion. There is nothing in the plea to indicate that Felder knew of the approach of the car, and he cannot be said to be guilty of negligence for failing to give a signal to stop the car unless he knew it was approaching.

Aside from the infirmity of the eighth plea, the trial court erred in admitting the ordinance in evidence, over the objection of the plaintiff, as it was immaterial and irrelevant. The undisputed evidence shows that the auto was on the right-hand side of the street. The automobile was astride the south rail of the track, and which said south rail was 12 feet from the south curb. The north rail was 15 feet from the north curb, and was therefore in the center of the street, and the auto was to the right of said north rail and was upon the right-hand side of the street.—See testimony of Berry, page 16 of the record.

The judgment of the circuit court is reversed, and the cause is remanded.

Reversed and remanded. All the Justices concur, except DOWDELL, C. J., not sitting.

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Alabama Consolidated Coal & Iron Company *v.* Cowden.

Frightening Animal.

(Decided November 28, 1911. Rehearing denied December 21, 1911.
56 South. 984.)

1. *Railroads; Frightening Animal; Complaint.*—Where the action was for injury to plaintiff caused by his mule becoming frightened by a locomotive operated by defendant near a public highway on which plaintiff was driving, a complaint alleging that defendant's servants in control of the train caused the engine to make such great oft-repeated and long continued noise that the mule was caused to get beyond plaintiff's control, and run away, and that the mule was frightened by reason and as a proximate consequence of the defendant's negligence in that it caused negligently or negligently allowed its engine to make or continue to make great and unnecessary noises while near a highway, was not demurrable, since, as a court must be construed as an entirety, it charged as negligence, the causing or allowing of the locomotive to make or continue to make great and unnecessary noises, which caused the mule to become frightened.

2. *Same; Negligence.*—Where the action was for injury caused by the frightening of the mule by noises made by defendant's locomotive near a highway, proof of mere want of necessity without more, for the noises was not sufficient to show negligence, as railroad companies are entitled to make all usual noises incident to the operation of their train, and negligence cannot be predicated upon such noises unless they were unnecessary, and the noises or the movement of the train were recklessly or wantonly made or done after discovery of plaintiff's peril, or were made or done with the intention of frightening the animal.

3. *Same; Instructions.*—A charge asserting that if the jury believe that the mule was frightened by the whistle, and that the whistle was blown in a careful and proper manner, and that plaintiff was not willfully, wantonly or intentionally injured, the jury must find for defendant, was properly refused, since while the manner in which the whistle was blown may have been careful and proper, yet the blowing thereof under the circumstances may have been wantonly done or done after becoming aware of plaintiff's peril.

4. *Same.*—Where there was evidence that the injury resulted primarily from the fright of the mule which was produced by the noises, and not necessarily as the immediate and direct result of any wanton, willful, intentional misconduct on the part of the operator of the locomotive, such an instruction was misleading, in so far as it hypothesized that plaintiff was not willfully, wantonly or intentionally injured.

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5. *Same; Damages.*—A charge asserting that if the jury is reasonably satisfied from the evidence that the whistling was done with a wanton disregard of plaintiff's rights, and with knowledge of the situation, and that to blow the whistle and continue to blow would result in injury to plaintiff, then the jury might inflict punitive damages had for its topic the basis or condition on which punitive damages might be imposed, and not the causal connection between the acts hypothesized and the result of which plaintiff complained, and hence, was not objectionable as omitting to hypothesize that the acts enumerated proximately caused the injury and damage complained of.

6. *Same; Punitive Damages.*—Where the operatives of a railroad locomotive continue to sound a whistle after they discover that the noise is frightening the animal being driven along a nearby highway, and that the animal is getting beyond the driver's control, such an act is a wanton disregard of the driver's safety, and will authorize the imposition of exemplary damages for injuries caused thereby.

7. *Negligence; Issue and Proof.*—While a general allegation of negligence in the complaint is sufficient, the evidence to sustain the same must tend to prove definite acts or omission amounting to negligence for which defendant is accountable, at least *prima facie*.

8. *Evidence; Opinion; Conclusion.*—Where a witness was asked whether a mule with which he was acquainted was ordinarily gentle, his answer that from what he had seen he would say it was a gentle mule, was not objectionable as a conclusion.

9. *Appeal and Error; Review; Pleadings.*—Where there was no demurrer to the complaint for failure to allege that the mule was of ordinary gentleness, such objection will not be considered on appeal.

10. *Same; Harmless Error; Evidence.*—Where the action was for injury to plaintiff by his mule being frightened by defendant's locomotive, the defendant was not prejudiced by the admission of evidence that the mule was ordinarily gentle; the presumption being that the fact that the animal frightened was one of ordinary gentleness was an essential factor to the solution of the question of negligence.

11. *Charge of Court; Instruction.*—A charge must be construed as a whole and error cannot be predicated upon an excerpt thereof only.

12. *Same; Abstract.*—A charge asserting that if a witness is reluctant to tell what he knows or is swift to tell it, or seems anxious to do so, juries will not have much confidence in him, was merely abstract and as the court stated that he did not say there was anything like that in this case, it was not prejudicial.

APPEAL from Birmingham City Court.

Heard before Hon. CHARLES W. FERGUSON.

Action by William D. Cowden against the Alabama Consolidated Coal & Iron Company. Judgment for plaintiff, and defendant appeals. Affirmed.

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The pleadings and facts sufficiently appear from the opinion. The following charge was refused to the defendant: (2) "If you believe from the evidence that the mule was frightened by the whistle, and if you also believe from the evidence that the whistle was only blown in a careful and proper manner, and that the plaintiff was not willfully, wantonly, or intentionally injured, you must find for the defendant." The fifth assignment of error is as follows: "The court erred in the following part of its oral charge: 'If you are reasonably satisfied from the evidence in this case that this was done with a wanton disregard of the plaintiff's rights, and with a knowledge of the situation, and that to blow the whistle and continue to blow the whistle would result in injury to the plaintiff, if you are reasonably satisfied from the evidence in this case that that state of facts existed, why, as I have already stated, you would have the right to inflict what the law calls punitive damages.' The fourth assignment of error was to the following part of the oral charge: "'Now, verdicts always are desirable, because trials are expensive. They are expensive, perhaps, to both sides, and the law don't like mistrels.' Relative thereto, the court said, after exception was taken: 'Now, gentlemen, I want to say another word on this subject of a verdict. Of course, the court or anybody else don't know what your verdict will be, and what the court had to say with reference to bringing in a verdict or having a mistrial is not intended to intimate one way or the other, because, as I said, the court don't know—it has no way in the world of knowing—what your verdict may be. Now, if, after full, fair, and conscientious consideration of the evidence in this case, you can't reach a unanimous verdict, and that is what the law requires, why, then, after you have—after you have done that, it would have to

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result in a mistrial, if you are unable to reach a verdict after full, fair, and conscientious consideration of all the evidence in the case.' ”

TILLMAN, BRADLEY & MORROW, L. C. LEADBEATER, and A. G. & E. D. SMITH, for appellant. The court should have sustained demurrers to the 1st count.—*Stanton v. L. & N.*, 91 Ala. 382; *Oxford L. Co. v. Stedham*, 101 Ala. 376; *B. R. L. & P. Co. v. Weathers*, 51 South. 303; 12 Am. Rep. 396; 22 Am. Rep. 522; 104 N. W. 617; 51 Am. Rep. 496; 47 Am. Rep. 592; *L. & N. v. VanZant*, 158 Ala. 527; *Cleghorn v. Western Ry.*, 134 Ala. 601; *L. & N. R. R. Co. v. Lee*, 136 Ala. 182. The court erred in refusing charge 2.—*Stanton v. L. & N., supra*. The court erred in its oral charge as to the conduct and demeanor of witnesses.—*Boswell v. Thompson*, 160 Ala. 306; *Berney v. Torrey*, 14 South. 685; *Paul v. The State*, 14 South. 634; *Grimes v. The State*, 63 Ala. 166; *L. & N. v. Watson*, 90 Ala. 68. The court erred in charging that the jury had a right to inflict punitive damages, as the charge omitted proximate cause.—*B. R. L. & P. Co. v. Moore*, 163 Ala. 43; *Same v. Jones*, 146 Ala. 277; *Hudgins v. So. Ry.*, 148 Ala. 154. The answer of the witness stated a conclusion, and was objectionable.—*So. Ry. v. Taylor*, 148 Ala. 52; *Rarden v. Cunningham*, 136 Ala. 263.

HARSH, BEDDOW & FITTS, for appellee. The 1st count was not subject to demurrer.—7 Ind. App. 171; *B. R. L. & P. Co. v. Weathers*, 51 South. 303, and cases cited; *Same v. Haggard*, 155 Ala. 343; *Same v. Adams*, 126 267; *Same v. Jung*, 161 Ala. 467; *H. A. & B. v. Miller*, 120 Ala. 535; *L. & N. v. Church*, 155 Ala. 329; *Armstrong v. Mont. St.*, 123 Ala. 233; *B. R. L. & P. Co. v. Jordan*, in MSS; 167 Ind. 330. The demurrer does

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not raise the question of the allegation of ordinary gentleness, and hence, it will not be considered. There was no error in refusing charge 2.—Authorities supra. Error cannot be based on excerpts from a charge, but the charge must be construed as a whole.—*So. Ry. v. Lynn*, 128 Ala. 298. Counsel discuss the other charges objected to, but without further citation of authority.

MCCLELLAN, J.—The theory of the action, which is instituted by appellee against appellant, is, according to the first count, that plaintiff's mule was negligently frightened and caused to run away by noises made by a locomotive on the railway of the defendant. Omitting the allegations descriptive of the injury and damages ensuing therefrom, this count is as follows:

"The plaintiff claims of the defendant \$10,000, as damages, for that, heretofore, to wit, on the 13th day of January, 1909, defendant was operating a train composed of a steam locomotive engine and certain cars upon a railway running near by a public highway, upon which public highway plaintiff was driving a mule attached to a vehicle; that defendant's servants or agents in charge or control of said train caused said locomotive engine to make such great, oft-repeated or long-continued noise as that by reason thereof said mule was caused to get beyond control of plaintiff and run away. * * *

"Plaintiff avers that said mule was caused to get beyond the control of plaintiff, and plaintiff suffered said injuries and damage, as aforesaid, by reason and as a proximate consequence of the negligence of defendant, in this, that defendant negligently caused or allowed the said engine, on the occasion above referred to, to make or continue to make great and unnecessary noise while the same was near said public highway."

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A count must be construed as an entirety.—31 Cyc. p. 83; *L. & N. R. R. Co. v. Holland*, 173 Ala. 675, 55 South. 1001. When this count is so considered, it is evident that the pleader characterized as *negligent* the causing or allowing the mentioned locomotive, on the occasion referred to, “to make or continue to make great and unnecessary noises,” wherefrom the animal became frightened. The reference in the fore part of the count to the duration, volume, or repetition of the noise made by the locomotive cannot be disassociated from the later averments wherein the noise is charged to have proceeded from a nonobservance of duty. The latter allegation is referred to the former allegation, in respect of the noise from the engine, by the express averment identifying the noise in each mentioned as made on the same “occasion.”

In actions for damages, it is a common practice, in our courts, to form the first count of a number, so as to facilitate its partial adoption, and to avoid repetition, in succeeding counts wherein distinguishable or different allegations of acts or omissions, constituting negligence, or willful or wanton wrong, are charged. Consistent with this practice, which is certainly not to be reprehended, it is usual to set forth a general history of the event along with a statement of the relation of the parties to each other, etc., and then, in a concluding paragraph, to allege the wrongful, proximate, cause of the injury and damage claimed. This practice cannot, of course, require or justify the construction of a count other than as a whole, as an entirety; nor can such a count, when so considered, be exempted from the influence of the rule, if within it, that “the sufficiency of a complaint, in an action for personal injuries, which undertakes to define the particular negligence which caused the injury, must be tested by the special allega-

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tion in that respect, although the general allegation of negligence would, in the absence of special allegations, be sufficient to make a *prima facie* case of negligence." —*B. O. & M. Co. v. Grover*, 159 Ala. 276, 48 South. 682, and earlier decisions therein cited.

But, as we interpret the count under consideration, it is not within the rule quoted. The noise caused or allowed to be made, *on the one occasion*, is alleged to have been "great and unnecessary," to have been "great, oft-repeated, or long-continued," and that this was "negligently caused or allowed."

The *Weathers* and *Parker Cases*, reported in 164 Ala. 23, 51 South. 303, and 156 Ala. 251, 47 South. 138, respectively, turned upon the construction of counts different from the count now under review. A comparison of the counts therein treated and that in hand will discover the differences. It is insisted for appellant that the count is insufficient in the particular that it does not affirm that the noise was recklessly, wantonly, or intentionally made, or that it was made with knowledge, by the operative, that the making thereof would likely frighten plaintiff's mule.

It is also insisted in brief, that the count is defective in its omission to allege that the animal frightened was of ordinary gentleness. There is no ground of demurrer specifying the last-stated objection to the count. Hence the sufficiency of the count, as respects that criticism, cannot be considered or determined. According to our interpretation of the count, it is, under the authorities, not subject to the demurrer interposed.—*Leach v. Bush*, 57 Ala. 145; *B. R. L. & P. Co. v. Jordan*, 170 Ala. 530, 54 South. 280; *Stanton v. L. & N. R. R. Co.*, 91 Ala. 382, 8 South. 798; *B. R. L. & P. Co. v. Haggard*, 155 Ala. 343, 46 South. 519; *Oxford Lake Line Co. v. Stedham*, 101 Ala. 376, 13 South. 553—among others.

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In actions of this kind, our rule, permitting general allegations of negligence to suffice, unless the other rule, before quoted as from *Grover's Case*, is applicable, establishes a distinction between the *allegation* of negligence and the *proof* of negligence. The former will serve to sufficiently state a cause of action; whereas, the evidence, to sustain, at least *prima facie*, a justified general averment of negligence, must of course tend to a more particular establishment of definite acts or omissions amounting to negligence for which the defendant is accountable. What amounts to negligence in occasioning the fright of animals by noises from or the operation of locomotives, where injury attends such fright, is a question that must, in a measure, depend upon the circumstances connected with the event.

In *Central of Georgia Railway Co. v. Fuller*, 164 Ala. 196, 200, 51 South. 309, 310, following what we took to be the rule established by decisions here, it was said: "That railroad companies have the right to operate their trains; that such companies have the right to make all the usual noises incident to the operation of their trains; and that negligence, alleged to have resulted in frightening an animal, cannot be predicated upon the operation of a train, unless in so doing unnecessary noises were made, and these noises, or the movement of the train, were recklessly or wantonly made or done after discovery of peril, or were made or done with the intention of frightening the animal in question.—*A. G. S. R. R. Co. v. Fulton*, 144 Ala. 332 [39 South. 282]."

It follows as of course that the *mere* want of necessity for making or allowing the noise, *without more*, is not negligence to liability for injury or damage resulting therefrom.—*Stanton v. L. & N. R. R. Co.*, 91 Ala. 382, 8 South. 798; *Oxford Lake Line Co. v. Stedham*, 101 Ala. 376, 13 South. 553; *Levin v. M. & C. R. R. Co.*,

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109 Ala. 332, 19 South. 395; *L. & N. R. R. Co. v. Lee*, 136 Ala. 182, 33 South. 897, 96 Am. St. Rep. 24; *Southern Railway Co. v. Crawford*, 164 Ala. 178, 51 South. 340.

Charge 2 was properly refused to defendant. The manner in which the whistle was blown may have been "careful and proper," and yet the blowing thereof, or the continuing to blow it, under the circumstances shown by the tendencies of the evidence, may have been wantonly done or done after becoming aware of his peril.—*A. G. S. R. R. Co. v. Fulton, supra.*

Besides, the phrasing of the instruction, in the particular that it hypothesized "that the plaintiff was not willfully, wantonly, or intentionally injured," was inapt, under phases of the evidence, since the injury was claimed to have been *primarily* consequent upon the fright of the animal, which was produced by the noise described, and not *necessarily* as the immediate, direct result, or connected in the order of causation, of any wanton, willful, or intentional misconduct of the operative. This rendered the charge confusing, if not misleading.

There was evidence, though opposed by other testimony, upon which it was open to be found by the jury that after the animal became frightened by the noise of the whistle and was getting beyond the control of the plaintiff, and after the operative knew of the situation produced by these two facts (if so), the operative continued to blow the whistle, which, if done under those circumstances, justified a finding that the operative was consciously disregardful of the plaintiff's safety in a condition of known peril, and that the basis for the imposition of exemplary damages existed.—*Fulton's Case, supra.*

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The oral charge of the court is set out in the bill. Construing it as a whole, as must be done, error cannot be predicated upon the excerpt quoted in the fifth assignment of error. The topic to which the court was addressing itself in this excerpt was the basis or condition of the imposition of punitive or exemplary damages, and not the causal connection between the acts hypothesized and the result of which the plaintiff complained. Hence the criticism, pressed in brief for appellant, that the court omitted hypothesizing that the acts enumerated "proximately caused" the injury and damage, is not well taken.

In *Birmingham Railway, Light & Power Co. v. Moore*, 163 Ala. 43, 50 South. 115, the instruction first treated concluded upon the *right* of plaintiff to recover, not the measure of recovery, in an event, as is the case in hand.

The third assignment is based upon this quotation from the oral charge of the court: "Well, that proceeds also from a common sense idea. If a witness is reluctant in telling what he knows about it, or is swift to tell what he knows about it, or seems anxious to tell what he knows about it, why naturally juries won't have much confidence in these sort of witnesses."

Succeeding this statement to the jury, the court said that this, with other suggestions for the aid of the jury in determining the credibility of witnesses, was "in the abstract," that "the court does not say that anything of that sort has transpired in this case." There is nothing in the bill to show that any witness on the trial brought himself within any of the categories mentioned by the court. We cannot presume that such was the case. It seems that the court was dealing, as it said it was, in general observations without any fact or act on the trial that invited or necessitated these observations.

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In the absence of any indication that any witness came, while testifying, within the description of the court's charge, as quoted, no more can be said than that it was abstract; and that prejudicial error (if error) is not shown. If any other view, on this record, was taken, it would be upon unsupported assumption. The converse, to sustain the trial court, is the rule on appeal.

In the light of the ample explanation in which the court took account of the exception, to the oral charge, affording the basis of the fourth assignment of error, no prejudicial error occurred.

The last assignment complains of the overruling of the defendant's objection to this question to the witness J. C. Orr: "You have had much experience in mules. From what you saw of that mule, would you say it was a gentle or wild mule?"

The grounds of the objection to the question were that it sought matter not the subject of expert opinion; that it called for immaterial, irrelevant, and incompetent testimony; and that the witness was not shown to have a knowledge of these things.

This witness had testified that he was engaged in the horse and mule business; and had been so engaged about all his life; that he had owned and sold the mule in question; that he had never used the mule; that Bufford, the purchaser of the mule from him, had worked the mule to a dairy wagon five or six months; that the witness had "very often" seen the mule when being worked to the dairy wagon; that he had seen the mule "standing on the streets untied, where electric cars, automobiles, bicycles, and things of that kind were running around it;" and that "very often he (evidently referring to Bufford) would drive up in front of my barn and stand there with automobiles passing, but no electric cars passing."

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In the fore part of this opinion, the question, pressed in brief for appellant, whether it is necessary to sufficiently state a cause of action for negligence, in cases of fright to animals by noises made by locomotives, that it be alleged that the animal frightened was one of ordinary gentleness, was pretermitted, since not taken by the demurrer to the first count.

From the doctrine of the *Stanton Case, supra*, it would seem to follow that the ungentle disposition of the animal frightened, at least in the absence of full knowledge thereof by the operative charged, would be wholly immaterial to any issue raised *by a general traverse* of a complaint like the count (the first) in this action.

Apart from this, however, the plaintiff's voluntary effort to show that the mule was one of ordinary gentleness could not, under the doctrine of *Stanton's Case, supra*, have involved prejudicial error to defendant on any idea that the matter of such testimony was *irrelevant or immaterial* to the issues in the cause. In that particular, such testimony tended to recognize a higher standard, in defendant's behalf, whereby to determine negligence *vel non* of its operatives; the implication therefrom being that the fact that the animal frightened was one of ordinary gentleness was an essential factor in the solution of the inquiry of negligence *vel non* in the premises.

In *Northern Alabama Railway Co. v. Sides*, 122 Ala. 594, 26 South. 116, *L. & N. R. R. Co. v. Vanzant*, 158 Ala. 527, 48 South. 389, and *L. & N. R. R. Co. v. Morgan*, 165 Ala. 418, 51 South. 827, the negligence charged was with respect to objects, alleged to have frightened the animals, for the presence of which the defendants were held responsible. It was ruled in cases of that character that the disposition of the animal for gentle-

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ness is an essential factor in the sufficient statement of a cause of action for fright produced thereby. Necessarily, proof, *prima facie*, of this disposition for ordinary gentleness, must, to support the allegation required, be made by the plaintiff. A different rule is, as appears, established by the *Stanton Case* and its successors in decision. The distinction taken was doubtless the result of the theory that noises emitted by locomotives are generally frightful to animals, whereas objects may, as in the *Sides Case*, be so inconsequential in respect of frightfulness that it could not be assumed that fright, thereby, of animals of ordinary gentleness, was to be reasonably anticipated or expected.

There is no merit in the other grounds of the objection to the question to the witness Orr. While the answer sought and given, viz., "I would say that from what I have seen it was a gentle mule," savored, in a sense, of a conclusion of the witness, yet it was not of that class of opinion evidence which the law holds inadmissible.—*Whittler v. Franklin*, 46 N. H. 23, 88 Am. Dec. 18; *Sydleman v. Beckwith*, 43 Conn. 9; *Patterson v. S. & N. R. R. Co.*, 89 Ala. 318, 7 South. 437; *Mattison v. State*, 55 Ala. 224; Jones on Ev. (2d Ed.) § 360.

We have treated every error assigned. None of them being, in our opinion, well grounded, the judgment must be affirmed.

Affirmed. All the Justices concur.

[Alabama Chemical Company v. Phelps.]

Alabama Chemical Company v. Phelps.

Injury to Servant.

(Decided November 23, 1911. Rehearing denied February 15, 1912.
57 South. 694.)

1. *Master and Servant; Injury to Servant; Warning.*—Where a foreman directed an employee to work at a point upon the ground 40 or 50 feet below an overflow pipe from which he knew sulphuric acid occasionally dripped, and the employee was ignorant of this fact, the failure of the foreman to warn the employee constituted negligence.

2. *Same; Assumption of Risk.*—An employee in charge of men engaged in taking down an overhead bin 15 or 20 feet above ground, but who had nothing to do with an overflow pipe still farther above ground, from which sulphuric acid occasionally dripped did not assume the risk of injury from the dripping of the acid in his eyes.

3. *Trial; Exclusion of Evidence; Admission in Part.*—Where parts of the evidence was clearly admissible, a motion to exclude the evidence of the witness not designating the objectionable part, was not sufficient.

APPEAL from Montgomery Circuit Court.

Heard before Hon. W. W. PEARSON.

Action by Julius D. Phelps against the Alabama Chemical Company, for damages for injuries received while in its employment. Judgment for plaintiff, and defendant appeals. Affirmed.

RAY RUSHTON and W. M. WILLIAMS, for appellant. The court erred in overruling defendant's motion to strike that part of the witness' testimony to the effect that Austin said the acid was dropping from the pipe, a drop every two or three minutes.—*M. & M. R. R. Co. v. Ashcraft*, 48 Ala. 15; 72 Ala. 117; *A. G. S. v. Hawks*, 72 Ala. 112. The court erred in rendering a verdict for the plaintiff on the evidence, first, because plaintiff failed to sustain the burden of proof to show that he was injured

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by acid dropping from the end of the pipe.—*So. Ry. Co. v. McGowan*, 149 Ala. 440; Rehearing opinion, 149 Ala. 456. The evidence does not show a negligent failure to furnish appellee with a reasonably safe place in which to work. Appellee assumed the risk of employment.—*G. C. & S. Ry. Co. v. Jackson*, 12 C. C. A. 507; *Chicago Edi. Co. v. Davis*, 93 Ind. 285. Phelps had knowledge of the acid mixture in the bins which will prevent his recovery.—26 Cyc. 1203, and authorities supra.

HILL, HILL & WHITING, for appellee. Part of the evidence was clearly competent and the motion to exclude it all was properly denied.—*Davis v. The State*, 131 Ala. 10; *Ray v. The State*, 126 Ala. 9; *Wright v. The State*, 136 Ala. 139. The movant itself brought out the testimony.—*Curtis v. Parks & Co.*, 136 Ala. 224. There was no error in rendering the verdict for the plaintiff on the evidence.—*Robinson M. Co. v. Colbert*, 132 Ala. 462; *W. Pratt C. Co. v. Andrews*, 150 Ala. 368; *Bir. T. Co. v. Reville*, 136 Ala. 335; *Osborn v. Ala. S. & W. Co.*, 135 Ala. 575. The common law duty is to provide a reasonably safe place for the servant to work.—*Wolf v. Smith*, 149 Ala. 457; 26 Cyc. 1097. Also to warn of latent danger.—5 Mayf. 643. The plaintiff did not assume the risk of danger from other sources and places.—26 Cyc. 118.

DOWDELL, C. J.—The cause was tried by the court below without the intervention of a jury, and a judgment was rendered in favor of the plaintiff. There are three assignments of error. The first two are in substance the same—one that the court erred in rendering judgment for the plaintiff, and the other that the court erred in not rendering judgment for the defendant. The third assignment relates to the action of the court in

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overruling the motion of the defendant to exclude certain evidence.

Under the issues in the case, we think the trial court on the whole evidence was fully justified in rendering a judgment in favor of the plaintiff. There can be no question that the plaintiff received the injury complained of, and that it was received while in the discharge of his duties under his said employment. That the injury was the result of sulphuric acid dropping in the eye of the plaintiff from the end of an unguarded overflow pipe 40 or 50 feet overhead where the plaintiff was required to be in the discharge of his duties was reasonably and satisfactorily shown by the evidence. That this was a dangerous place, and that the plaintiff was ignorant of the danger of the dropping of the acid, we think there can be no doubt.

The plaintiff's superior, Austin, the foreman of the defendant, and who had superintendence of the plaintiff, and who ordered the plaintiff to perform the service at which he was engaged when injured, knew of the dropping of the acid from the overflow pipe, and hence that the place was dangerous, failed to inform or warn the plaintiff of such dangers, and was therefore guilty of negligence in the failure to notify and warn the plaintiff. The occasional dropping of the acid from the end of a pipe 40 or 50 feet overhead down upon the ground below was by no means an obvious danger, nor one that would have been discovered by ordinary care and prudence.

The contention of the defendant that the plaintiff assumed the risk of the danger of the acid dropping upon him is without merit. The plaintiff was put in charge of a gang of men to take down an overhead bin for repairs, which was 15 or 20 feet above ground, and had nothing to do with the overflow pipe from which the

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acid dropped, and we are unable to see how it could be in reason said that in superintending this work he assumed the risk of danger from something disconnected from the work. We see no reason for disturbing the judgment of the trial court.

The plaintiff was examined as a witness in his own behalf, and in the course of his examination stated: "Immediately after my injury, they went, or sent, to see what it was. He came back and said, 'It is acid.' He says it is dropping a drop every two or three minutes." No objection was taken to this statement of the witness at the time, but after the conclusion of the examination of the witness, direct and cross, the bill of exceptions recites that the following motion was made by the defendant: "We move to exclude what Mr. Austin said because it was not a part of the res gestae." The court overruled this motion, and the defendant excepted. It is not clearly shown from the bill that the statement quoted above was said by Austin. In the use of the pronoun "he," it may be that the witness was referring to Austin, but it cannot be positively asserted that he was referring to Austin.

But, if it be conceded that the witness meant Austin, the record discloses that the statement quoted was not all that the witness testified that Austin said during the course of the examination, and some of which was clearly relevant and competent. The exception reserved is in its nature too indefinite to put the trial court in error. Moreover, Austin was himself examined as a witness, and testified that there was occasional dropping of acid from the pipe, although he denied telling plaintiff that it was dropping a drop every two or three minutes. With the statement objected to eliminated, there was without dispute sufficient evidence left, as to this question, to warrant the judgment. We cannot say that the

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trial court committed reversible error, and the judgment will be affirmed.

Affirmed.

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Injury to Servant.

(Decided January 9, 1912. Rehearing denied February 17, 1912.
57 South. 691.)

Master and Servant; Injury to Servant; Contributory Negligence.—Under the facts in this case it is held that plaintiff's failure to avoid the danger arising from defects in the machinery was at least due to inattention, absent-mindedness or thoughtlessness and hence, plaintiff was guilty of contributory negligence proximately contributing to his injury.

APPEAL from Jefferson Circuit Court.

Heard before Hon. A. O. LANE.

Action by Thomas S. Jackson against the Kilby Frog & Switch Company, for damages for injuries sustained while in its employment. Judgment for plaintiff and defendant appeals. Reversed and remanded.

WEATHERLY & STOKELY, for appellant. The plaintiff testified that he knew of the danger but forgot about it, and under such circumstances, heedlessness or thoughtlessness is the very essence of negligence.—*Wood v. Richmond & D. R. Co.*, 100 Ala. 660; *R. R. Co. v. Hall*, 87 Ala. 719; *George v. R. R. Co.*, 109 Ala. 256; *Coosa Mfg. Co. v. Williams*, 133 Ala. 611; *Bear Creek M. Co. v. Parker*, 134 Ala. 93. Plaintiff was guilty of contributory negligence as a matter of law.—*Gainor v. So. Ry. Co.*, 152 Ala. 186; *King v. So. Ry. Co.*, 41 South. 639; *So. Ry. Co. v. Arnold*, 114 Ala. 183. On these authori-

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ties, it is insisted that the charges requested should have been given. Penrod was under no duty to warn the plaintiff of so obvious a danger, and hence, the affirmative charge should have been given as to count 9. *Repub. I. & S. Co. v. Williams*, 53 South. 79; *So. Co. Oil Co. v. Walker*, 51 South. 175; *Horan v. G. D. Hdw. Co.*, 48 South. 1029.

ULLMAN & WINKLER, and **HARSH, BEDDOW & FITTS**, for appellee. Under the facts in this case the question of contributory negligence was one for the jury.—*L. & N. R. R. Co. v. Hall*, 87 Ala. 719; *Coosa Mfg. Co. v. Williams*, 133 Ala. 611; *Clotts v. P. & M. Mach. Co.*, 17 L. R. A. (N. S.) 904; *R. & D. R. R. Co. v. Powell*, 149 U. S. 43. His knowledge and his manner of doing the work, whether negligent or not were questions for the jury.—*Osborn v. Ala. S. & W. Co.*, 33 South. 689; *M. & B. R. R. Co. v. Holman*, 84 Ala. 133; *So. Ry. Co. v. Shields*, 121 Ala. 460; *Ala. S. & W. Co. v. Talent*, 51 South. 838.

SIMPSON, J.—This is an action by the appellee, as an employee, for injuries received by having his leg caught between certain parts of a planing machine while he was operating the same. The case was tried on counts 4, 6, 7, 8, and 9.

The plaintiff's leg was caught between what is called the "knocker" or "dog" of the machine, and the shifting lever. Count 4 claims on account of the negligence of the defendant in not exercising "reasonable care and skill to furnish plaintiff with a reasonably safe machine or appliance with which to do his work." Count 6 alleges the failure of defendant to furnish a reasonably safe place to do the work. Count 7 rests upon the negligence of one Penrod, who had superintendence, etc., in that he knew the defective condition of the ma-

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chine, and informed plaintiff that the machine had been "fixed," and instructed plaintiff to go to work on it. Count 8 rests upon the same negligence of said Penrod to whose orders plaintiff was bound to conform and did conform. Count 9 rests upon the negligence of said Penrod, as superintendent, in failing to instruct the plaintiff as to the dangers attendant upon the operation of the machine. The pleas are the general issue and contributory negligence.

The "frog," "switch," or "crossing" which is to be cut is laid on the table of the machine, above which is the "head," being a metal case, with a screw running down through it, holding the tool, which is a chisel, and this tool is adjusted up or down, according to the height which it is wished to cut. Such machines usually have a rod attached, by which the operator can stand two feet from the machine and work the head up and down, but in this machine there was no rod, nor had there been any, so far as the witnesses know, so that the only way to move the tool up or down was to stand nearer the machine, and reach above the operator's head and turn the wheel at the top of the screw. The bed of the planer runs along horizontally when the machine is in operation. The shifter protrudes from the bed of the machine about two feet, and on the same side and attached to the edge of the bed is the dog, which is a piece of metal protruding about six inches from the table, and, as the table moves back slowly towards the shifter, it strikes the shifter, and that automatically sets it in reverse motion. The plaintiff, while operating the machine and in the act of turning the wheel to lower the tool, placed his right leg forward so that it was caught between the dog and the shifter as they came together.

The bed of the machine is about 14 feet long, but the length of the stroke is regulated by the length of the

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cut which is to be made. The speed of the machine and stopping and starting it are within the control of the operator. Ordinarily the wheel can be turned with one hand, but, if the screw is tight, the operator has to raise both hands about six inches above his head and turn it.

The plaintiff testified that he was 26 years old; that he had been working for the defendant a month or 6 weeks, and at this particular machine about 2 weeks; that he had broken the machine about 10 days before the injury (he does not say in what particular), and that Penrod had told him it was "fixed," and to go to work; that the head worked hard, and he asked the master mechanic to come and start it, which he did, putting grease on it and loosening it up; that it was all he could do to move it with both hands; that he was working on a small frog about 3 or 3½ feet long; that when Parsons showed him the machine, he told him to watch a certain mark, beyond which the screw was not to be turned, as it was too short; that no one had warned him of the danger of getting caught between the knocker and the shifter; that he worked on various machines for 12 or 13 years; that he had been adjusting the tool, by the use of the wheel, "during the six weeks he had worked on it every day that he worked," and did it by leaning over and catching hold of the wheel; that he watched the movement of the bed back and forth, knew the knocker was at the end and where the shifter was, knew when the knocker came back against the shifter it would hit the shifter and move the machine back the other way, knew that, if his leg was in there, it would get caught, "but, if he knew his leg was in there, he would have it out;" that he never thought of it, and it was never explained to him about the danger; that the knocker came up from the left side, did not strike his left leg, but caught his right one; that he had not

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worked the machine exactly like it was for 6 weeks, but laid off a week, worked three different machines, and worked this machine without intermission for 2 weeks, having previously worked another planer; that he had to step into the position he was in to get a purchase on the wheel, either that, or put both legs up.

It appears from the evidence that it was within the power of the operator to have stopped the machine, screwed down the tool with the wheel, and then started it, or, if he wished to screw it down while in motion, if he had noticed when the dog or knocker struck the shifter, and reversed the motion, he would have had time to turn the wheel and return to his position before the knocker returned. He had evidently worked it without injury for at least two weeks, and, according to his own testimony, knew that if he placed his leg in that position, and kept it in there until the knocker came back, it would be caught.

We cannot escape the conclusion that his failure to avoid the danger was at least due to "inattention, indifference, absent-mindedness, forgetfulness," or "thoughtlessness," and consequently that "he was guilty of negligence which proximately contributed to his injury."—*Wood v. Richmond & D. R. Co.*, 100 Ala. 660, 13 South. 552; *L. & N. R. R. Co. v. Hall*, 87 Ala. 708, 719, 720, 6 South. 277, 4 L. R. A. 710, 13 Am. St. Rep. 84. Consequently, the general affirmative charge should have been given in favor of defendant as requested.

It is unnecessary to consider other assignments of error.

The judgment of the court is reversed and the cause remanded.

Reversed and remanded. All the Justices concur, save DOWDELL, C. J., not sitting.

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Injury to Servant.

(Decided December 19, 1911. Rehearing denied February 15, 1912.
57 South. 882.)

1. *Bill of Exceptions; Signing; When in Fieri.*—When a bill of exceptions is presented to the trial judge within 90 days after the judgment, and signed by him within 90 days, if the signing is in term time, the bill of exceptions is in fieri until the adjournment of the term; but, like other parts of the record, it cannot be altered or modified after adjournment; if it is not signed in term time, it remains in fieri until signed, or until the expiration of the period for signing or presenting has expired, but upon being signed and filed, it becomes a part of the record, and if signed after the adjournment of that term of the court, it is no longer in fieri, and cannot be changed or modified by the judge.

2. *Same; Withdrawing Signature.*—Under the facts in this case, it is held that the action of the court in withdrawing its name from the bill of exceptions was subsequent to the end of the term and subsequent to the signing and filing of the same with the clerk, and hence, was unauthorized and void.

3. *Judgment; Entry on Docket; Alteration.*—After adjournment of the term a judgment entered upon the minutes, the minutes having been signed by the judge, cannot be altered or amended except for clerical error or omission on evidence shown by the record; parol evidence being insufficient to warrant amendment nunc pro tunc.

4. *Same; Record; Evidence.*—The mere omission of the bench notes of the trial judge to mention pleadings is not such record evidence as warrants alteration after the expiration of the term of a duly entered judgment, which recited the existence of such pleadings, as there is no law requiring the judge to make bench notes.

5. *Same.*—Where the original judgment entered by the clerk was stricken out and another substituted, the fact that the original judgment still appeared in the minutes of the court was not such record evidence as would warrant the court in amending the second judgment nunc pro tunc after the expiration of the term, for without the aid of parol evidence, it will be presumed that the first was erased by order of the court.

(Anderson, McClellan and Mayfield, JJ., dissent.)

APPEAL from Birmingham City Court.
Heard before Hon. C. W. FERGUSON.

[*Briggs v. Tennessee Coal, Iron & Railway Company.*]

Action by Millage Briggs against the Tennessee Coal, Iron & Railroad Company for injuries while engaged in its employment. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

A trial was had and judgment entered under the following facts: On the 25th day of March, 1910, judgment was rendered in favor of the defendant, and the judge's bench notes showed as follows: "By leave of the court, plaintiff refiled his complaint and amendments thereto. By leave, defendant refiled its demurrers heretofore filed, and also additional demurrers, by separate paper of this date, to each count of the complaint as refiled. By leave, the defendant refiled pleas 1, 2, and 4 and plea 3 as amended, by separate paper filed after demurrer to each count of the complaint overruled. Plaintiff, by leave, refiled its demurrers heretofore filed to pleas 2 and 4, and plea 5. Demurrers to plea 3 sustained. Verdict and judgment for the defendant." From said bench notes the clerk entered the following judgment: "On this the 25th day of March, 1910, this cause being reached on the docket and called for trial, came the parties by their attorneys, and the plaintiff, by leave of the court first had and obtained, refiles his complaint and the amendment thereto. The defendant now, by leave of the court first had and obtained, refiles its demurrers thereto, as appears by separate paper writing this day filed. Demurrers to each count of the complaint are by the court heard and considered, whereupon it is ordered, adjudged, and decreed that said demurrers be and they are hereby overruled. Defendant now, by leave of the court first had and obtained, refiles pleas 1, 2, and 4, and plea 3 as now amended, as appears by separate paper writing this day filed. The plaintiff now, by leave of the court first had and obtained, refiles his demurrer heretofore filed to

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pleas 2, 4, and 5. The demurrer to plea 3 is by the court heard and considered, whereupon it is ordered, adjudged, and decreed by the court that the said demurrer is hereby sustained; and issue now being joined thereupon," etc. It appears that the clerk, or the plaintiff's attorney, with the consent of the clerk, changed the minutes by drawing a red line or lines through them, and entered in lieu of said judgment the following judgment: "On this the 25th day of May, 1910, this cause being reached upon the docket and called for trial, come the parties by their attorneys, and plaintiff, by leave of the court first had and obtained, refiles his complaint and the amendment thereto. The defendant now, by leave of the court first had and obtained, refiles its demurrers to the complaint, and also files additional demurrers thereto, as appears by separate paper writing this day filed. The demurrers to each count of the complaint are by the court heard and considered, whereupon it is ordered and adjudged that the said demurrers be and they are hereby overruled. The defendant now, by leave of the court first had and obtained, refiles pleas 1, 2, and 4, and plea 3 as now amended, as appears by separate paper writing this day filed. Plaintiff now refiles to plea 5 all demurrers heretofore filed to pleas 2 and 4. Demurrers to plea 2 are by the court heard and considered, whereupon it is ordered and adjudged by the court that the demurrers to plea 2 be and the same are hereby overruled. Demurrers to plea 3 are by the court heard and considered and it is ordered and adjudged by the court that the demurrers to plea 3 be and the same are hereby in all things sustained. Demurrers to plea 4 are by the court heard and considered, whereupon it is ordered and adjudged that the demurrers to plea 4 be and the same are hereby in all things overruled." Then follows the same order as to plea 5,

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together with a joinder of issue and finding in favor of plaintiff. On the 6th day of December, petition therefor having been filed, and set for hearing on December 1, 1910, by the defendants in said cause, said last-named judgment was stricken, and the original judgment as entered by the court was restored to the minutes. In the meantime a bill of exceptions had been prepared and presented to and signed by the judge, containing the minute entry as changed and last made. The court's attention having been called to the change by this motion, the judge struck his name from the bill of exceptions. The cause was submitted on motion to establish the original bill of exceptions as signed by the judge, and from the order made by the judge, striking the changed minute entry and restoring the original minute entry.

DENSON & DENSON, for appellant. The court erred in overruling plaintiff's demurrer to plea 4 as an answer to count 3.—*M. & C. v. Martin*, 117 Ala. 382; *So. Ry. Co. v. Bunt*, 131 Ala. 595; *B. R. L. & P. Co. v. Brown*, 150 Ala. 331; *Bessemer C. I. & L. Co. v. Doak*, 152 Ala. 172; *B. R. L. & P. Co. v. Jaffee*, 154 Ala. 554; *Martin v. U. S. & N. R. R. Co.*, 163 Ala. 218. The plea of assumption of risk was no answer to that count.—*B. So. v. Powers*, 136 Ala. 239; *So. Ry. Co. v. Hyde*, 1 South. 369. The court erred in overruling demurrers to plea 5, as answer to count 3 of the complaint.—*H. A. & B. v. Robbins*, 124 Ala. 118. The court erred in overruling plaintiff's demurrer to plea 4 as an answer to count 2.—*Pioneer M. & M. Co. v. Smith*, 150 Ala. 359; *So. Ry. v. Guyton*, 122 Ala. 242; *So. Ry. v. Shields*, 121 Ala. 465; *H. A. & B. v. Walters*, 91 Ala. 442. A servant does not assume the risk incident to the negligence of a superintendent or of a person to whose orders he is bound to

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conform, and does conform.—*Woodward I. Co. v. Andrews*, 114 Ala. 257; *L. & N. v. Wynn*, 51 South. 978. The court erred in overruling demurrs to pleas 2 and 5 as answer to the complaint.—*Osborn v. Ala. S. & W. Co.*, 135 Ala. 575; *Wes. C. & F. Co. v. Bean*, 163 Ala. 263; *So. Ry. v. McGowan*, 149 Ala. 452; *Pioneer M. & M. Co. v. Smith*, 150 Ala. 359. The trial judge was without authority to withdraw his signature from the bill of exceptions after he had signed it and it had been filed with the clerk of the court.—*Bridges v. Kuykendall*, 58 Miss. 828, and Alabama cases cited; *Perry v. Cent. R. R.*, 74 Ga. 411.

PERCY, BENNERS & BURR, for appellee. On motion to establish bill of exceptions and to strike the bill of exceptions from which the judge had stricken his name counsel cite.—*Northington v. Jones*, 37 Ala. 240; *Strawbridge v. State*, 48 Ala. 308; *Posey v. Beale*, 69 Ala. 32; *Middleton v. Wilson*, 84 Ala. 273. Counsel also insist on the authority of *L. & N. v. Malone*, 116 Ala. 600, and *Keith v. Korman, et al.*, 56 South. 658, that the rule which declares that parol evidence is inadmissible to vary or contradict the record does not prohibit the introduction of such evidence when the purpose is to show that the paper writing or instrument which purports to be a record is in fact not a record. A judge has no authority or control over a record after the adjournment of the term at which the record was made.—*Kitchen v. Moye*, 17 Ala. 394, and authorities supra; *Poole v. R. R. Co.*, 5 Ala. 257; 3 Cyc. 50.

ANDERSON, J.—Section 3019 of the Code of 1907 authorizes the presentation to the judge of a bill of exceptions within 90 days after judgment is entered, and further gives the judge 90 days after the presentation

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within which to sign same. This period of 90 days given the judge was intended as a sufficient time within which he should go over and determine the correctness of same, and it stands to reason that he will not sign it before ascertaining its correctness. Section 3018 provides that, after he signs said bill it thereby becomes a part of the record, and after it becomes a part of the record, if in term time, it would be in fieri until the adjournment of the court, but, like other parts of the record, cannot be altered or modified after adjournment.

—*Posey v. Beale*, 69 Ala. 32; *Chapman v. Holding*, 54 Ala. 61; *Branch Bank v. Kinsey*, 5 Ala. 9; *Weir v. Hoss*, 6 Ala. 881; *L. & N. R. Co. v. Malone*, 116 Ala. 600, 22 South. 897; *Bridges v. Kuykendall*, 58 Miss. 827. On the other hand, if it is not signed in term time, the statute keeps the matter as to the bill of exceptions in fieri until the same is signed, or until the expiration of the period for signing or presenting same unless it is sooner signed; but the very moment it is signed and filed it becomes a part of the record, and, if it becomes such after the term of court has adjourned, it is no longer in fieri, and it is beyond the power of the judge to change or modify same. If the bill as signed by him is not the proper one as tendered, the aggrieved party may proceed to establish same under section 3021.—*Turner v. White*, 97 Ala. 549, 12 South. 601. But, until steps are taken to do so, the bill, as signed and filed by the judge, will be treated by this court as the true and correct one. The bill of exceptions is in fieri for 90 days from presentation and 90 additional days for consideration by the judge, but, if the bill is presented sooner and the judge sees fit to sign and file the same before the expiration of the 90 days given him within which to sign, the suspension is thus cut down, and, after the signing and filing of same, the matter is no longer in

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fieri, and is beyond the power of the judge. The cases of *Posy v. Beale, supra*, and *L. & N. R. R. Co. v. Malone, supra*, both held that the bills of exceptions there involved could not be changed or altered by the judge after being signed and after the adjournment of court, and stated that the change could not be made after the adjournment of court or beyond the time agreed upon by counsel. This last expression was mere dictum in said cases, as neither of them involved the question of changing a bill of exceptions after it was signed and filed and before the expiration of the time for signing same, for in each case the attempted correction was after the adjournment of court, and after the expiration of the time given for signing the bill. We think that what the court meant to state in the cases *supra* was that the question as to the bill of exceptions was in fieri only during the term of the court or until the expiration of the time within which the bill could be signed, and that the court did not mean to hold that the signing and filing of same when done within the time allowed would authorize the judge to subsequently withdraw his signature or change or alter same, even if done before the expiration of the period within which the bill could be signed. In other words, we hold that, if the bill is signed in term time, the matter is still in fieri until the adjournment of the term, but, if not signed in term time, it is still in fieri until the bill is signed by the judge and filed with the clerk, the period, of course, not to extend beyond the time fixed by law for signing, but, when the bill is signed and delivered, the matter is no longer in fieri, and the power and control of the judge is at an end. The action of the judge in withdrawing his signature from the bill of exceptions was subsequent to the end of the term, as fixed by the practice act, being more than 30 days after the rendition of the judgment.

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—Weakley's Local Laws of Jefferson County, p. 598, § 20; *Stein v. McArdele*, 25 Ala. 562. It was also subsequent to the signing and filing of same with the clerk and was unauthorized and void.—*Ex parte Nelson & Kelly*, 62 Ala. 379, 380; *Dudley v. Chilton County*, 66 Ala. 597, and authorities supra. We will therefore treat and consider the bill of exceptions signed and filed on January 24th as the true and correct one.

As we understand the facts in this case, a judgment was rendered for the defendant on May 25, 1910, and a judgment was written up by the clerk on a slip or folio, which was subsequently to be bound in book form, as the minutes of the court, and which said entry conformed to the bench notes made during the trial; that within 10 days thereafter the minute entry as written by the clerk was changed either by the clerk or by plaintiff's counsel with the consent of the clerk, so as to include rulings not disclosed by or included in the bench notes. Nor does it appear that this change was brought to the attention of the judge until November 26, 1910, during another term of the court, or that the presiding judge knew of such change when signing the minutes with all of the other judges on June 30th, the end of the term. “The object of a judgment nunc pro tunc is not the rendering of a new judgment and the ascertainment and determination of new rights, but is one placing in proper form the record, the judgment that had been previously rendered, to make it speak the truth, so as to make it show what the judicial action really was, not to correct judicial errors, such as to render a judgment which the court ought to have rendered, in place of the one it did erroneously render, nor to supply nonaction by the court, however erroneous the judgment may have been.”—*Wilmerding v. Corbin Banking Co.*, 126 Ala. 278, 28 South. 640, and cases cited. It is

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also a well-established rule that judgments can be amended nunc pro tunc only upon record evidence or evidence quasi of record, and the deficiency in a judgment or decree cannot be supplied by parol.—6 Mayfield's Dig. § 75, p. 504. The present motion was not to invoke any rulings that were not made, but to, in effect, eliminate from the judgment entry rulings which were not made, but which had been erroneously embodied therein by the subsequent action of the clerk and plaintiff's counsel, and the correction could be made by a judgment nunc pro tunc.—*Ware v. Kent*, 123 Ala. 427, 26 South. 208, 82 Am. St. Rep. 132. The first judgment entry conforms to the bench notes, and is presumably the one that received the sanction and approval of the trial court. The contrary not appearing, public officers are presumed to do their duty, and section 5732 of the Code of 1907 requires that the minutes must be read each morning in open court. The obvious purpose of this wise and highly important statute was to enable the trial court to check up the minutes, and see that they were correctly entered in conformity with the bench notes, or that one or both should be corrected, if not correct, while the facts and proceedings were fresh upon the minds of the court and counsel. Indeed, this court has announced that it is a custom to comply with this statute, and said, speaking through Stone, J., in the case of *Lanier v. Russell*, 74 Ala. 367: "The system and practice in our common-law courts of general jurisdiction we think furnish a safe analogy and guide in cases like the present. The statute directs that the minutes of those courts must be read each morning in open court.—Code 1876, § 546. This must mean that the minutes made by the clerk of the court's proceedings during one day must be read on the morning of the next succeeding day. Now, in practice, these proceed-

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ings are generally entered up after the adjournment of the court for the day, frequently during the night, after judicial hours, and often finished up during the next morning, before court convenes. Yet the judgment bears date, and should bear date, of the day the proceedings were had in the court. Such we think has been the universal custom since our judicial system was organized." Not only does the statute and custom direct and recognize the daily keeping and reading of the minutes, but section 3714 of the Code of 1907 provides extra compensation at a per diem rate for this particular service. Here we have a judgment that was presumably the one approved by, and was in fact, the judgment of the court, and which is subsequently changed without the assent or knowledge of the court, and which said change was not brought to the attention of the judge before signing the minutes upon final adjournment, or, in fact, until November 26th of a succeeding term. The court makes the rulings and pronounces the judgments, and it is but the clerical duty of the clerk to record the minutes as directed by the court, through the bench notes or otherwise; and, when said minutes are so recorded and approved by the court, the clerk or no one else has the right to change them, even during the term, unless directed by the judge to do so or unless the unauthorized change is subsequently ratified by the judge. It might be that, if the judge knew of the change when he signed the minutes, this would be an approval or ratification of the change, but it affirmatively appears, in the present case, that he did not know of said change when signing the minutes. Nor can we say that the mere signing of the minutes at the end of the term concludes the judge as to all things contained therein. If such was the case, there could never be a correction. It might be that such a signing would be presumptive evi-

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dence of the correctness of same, but, when it appears that a change was made between the approval of the minutes and the final signing of same and that the judge did not know of same, the presumption from signing the minutes cannot overcome the other presumption of correctness growing out of the reading of the minutes and the approval of same. We therefore think that the record or quasi record evidence supports the first minute entry, and shows that the change was not authorized, and that it was not subsequently ratified. On the other hand, if we are to consider parol evidence or evidence de hors the record, we cannot say that the conclusion of the trial court was wrong, as this is an appeal upon which all reasonable presumption must be indulged in favor of the finding of the trial judge, and which said finding must not be disturbed unless it is plainly erroneous. It is true the practice act of the city court requires us to review the rulings and conclusion, on the facts, of the trial judge without any presumptions in favor of the correctness of same, but whether said section applies to trials of motions of this character, as distinguished from ordinary cases, we need not decide, but may concede that it does; yet that provisions of the act and ones similar thereto have been repeatedly construed as governing us only in cases where this court has before it the same data and advantages for considering the evidence as did the trial court.—*Thompson v. Collier*, 170 Ala. 469, 54 South. 493; *Simpson v. Golden*, 114 Ala. 336, 21 South. 990; *York v. State*, 154 Ala. 60, 45 South. 893, and many cases there cited. This is a case in which the trial judge was a witness to, and in a sense, a party to the transactions involved, and, while he does not testify in the case, yet we know that he was a witness to what took place on the trial, and after the motion was made, and, while

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considering same, he may have refreshed his memory, was aware of his custom and habit of noting the rulings in the bench notes, and may have had in his breast and mind many reasons for holding that the first minute entry was the correct one, and which said facts and circumstances could not be, and are not, presented to this court so as to give us the same advantages and opportunities of passing on the facts as was possessed by the trial judge.

A majority of the court, however, are of a different opinion, and think that the trial court erred in granting the motion nunc pro tunc. As the last judgment must be considered as the proper one, we are all of the opinion that the main case must be reversed for the overruling of plaintiff's demurrers to pleas of contributory negligence to the wanton count of the complaint.

The case is therefore reversed, and the cause is remanded.

Reversed and remanded.

ANDERSON, McCLELLAN, and MAYFIELD, JJ., dissent on the question of amending judgments nunc pro tunc.

SIMPSON, J.—When the judgment in this case, as last formulated, was entered upon the minutes and the minutes were signed by the judge, it became the judgment of the court, and, after the adjournment of the term of the court, it was beyond the power of the judge to alter or amend the same, "except for a clerical error or omission on evidence shown by the record."—*Chamblee et al. v. Cole*, 128 Ala. 649, 651, 30 South. 630, and cases cited. This principle, clearly recognized by a long line of decisions, is necessary in order that the records of our courts may, as the law requires, import absolute verity unless attacked by the known methods within

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the power of a court of chancery. Parol testimony is not admissible in a proceeding to alter, amend, or correct a record by an amendment *nunc pro tunc*, which, according to the authorities cited and many others, must rest alone on matter apparent on the record.

It cannot be said that the mere fact that the bench notes made by the judge do not mention the pleadings in question furnishes record evidence that no such action was taken as set out in the minutes, for the reason that there is no law requiring the judge to make bench notes, and the minutes of the court, and not the bench notes, constitute the record of the case. Nor does the fact that the previous judgment appears on the loose leaves of the minutes furnish any such record evidence, for, without the aid of parol testimony, it shows that it was erased, which is presumed to be the act of the court.

Consequently the action of the court in granting a motion to correct the judgment entry at a succeeding term of the court was erroneous and of no effect.

DOWDELL, C. J., and SAYRE and SOMERVILLE, JJ., concur.

ANDERSON, J.—While Justices McCLELLAN, MAYFIELD, and the writer think that the change in the first judgment entry was unauthorized, and that the trial court had the right to correct the record by eliminating the entry, as changed, and reinstating the original entry, we do not wish to impute any improper motives to counsel or the clerk in making said change. While the change was unauthorized and should not be binding on the trial court, the evidence was sufficient to justify them in entertaining the belief that the first entry was incomplete, and counsel naturally took the matter of

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correcting the same up with the clerk, when prudence should have suggested his doing so with the judge. We do not think there was any intention whatever to falsify the record, and are not disposed to further combat the conclusion of the majority in the instant case, and but for the influence and force of the opinion in the future there would be no attempt to reply to the majority opinion.

I fully agree with the majority that parol evidence cannot be resorted to in order to supply matters which do not appear of record, but I do think that parol evidence can and should be resorted to in order to explain how and by whom entries upon the record were made, obliterated, or altered; otherwise it could never be shown *nunc pro tunc* that the trial court did not make or direct entries, notwithstanding they may have been made without warrant or authority.

I also think the bench notes and first judgment entry were not only record or quasi record evidence of what judgment was really rendered by the court, but that they offered the highest and best evidence of same. They may not affirmatively contradict the second entry, but they do afford negative evidence that the rulings contained in the second entry and not disclosed by the bench notes and first entry were not in fact made, else they would have appeared therein. The first entry was presumably read in open court, the morning after the trial, was approved by the trial court, and thereby became the judgment of the court, subject to change only by or with the assent of the trial judge, and to my mind it is monstrous to reject this entry as record evidence and give absolute verity to the second one, made without the knowledge or consent of the trial judge. The holding renders trial courts absolutely helpless to make their judgments speak the truth. In other words, not-

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withstanding the statute is complied with and the minutes are read in open court, as the law requires, the judgment so read may be subsequently canceled without the knowledge or consent of the trial judge, and the unauthorized one so substituted by counsel and clerk, at any time before the court adjourns, becomes conclusively the judgment of the court, and the first entry cannot be looked to as record evidence. If this second entry becomes ipso facto the judgment of the court, what would be the result if counsel on the other side convinced the clerk a few days later that the second entry was incorrect and induced him to change it, and a few days later another change was made, each entry as canceled appearing with red lines through same, what one should be regarded as the true and proper judgment of the court, the one presumably read in open court and approved by the judge, or one of the numerous changed or amended ones and as to which the trial judge was not a party?

I also think that my Brother SIMPSON attaches too little importance to the first entry, which, as he says, appeared upon "loose leaves of the minutes." It appears that in the city court all minutes are first written upon loose leaves, which are subsequently bound together in book form, and the second entry, the one to which the majority imply absolute verity, was written in the same way as the one discredited by them, and seems to be in part upon the same loose leaf which contains the first one. The copy of the minutes sent up shows the first entry on pages 623 and 624 of Book 29 A, with two red lines running through the face of same, and immediately succeeding it is the second entry, commencing on page 624. This first entry conforms to the bench notes, and the second one does not, and the proof shows, which was not objected to, that the red

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lines were run through the first entry, without the knowledge or authority of the trial judge, and that he did not know of the existence of the second one until long after the adjournment of the court for the term. If the action of the clerk was a mere clerical error, it could be corrected upon motion *nunc pro tunc*. If, on the other hand, the action of the clerk was not entirely clerical, then his act in canceling the first judgment and creating a second one was unauthorized and void, and the trial court had the power to vacate or expunge the record and expunge the cancellation of the first one so as to make the record disclose the true and real judgment of the court. To my mind the holding of the majority will be most far-reaching and dangerous. A trial court may have the minutes read, as the statute directs, and then correct or approve same, then, after that is done, the clerk or some one else may change the entry, and, if the judge happens to sign the minutes, he is bound by the changed entry, notwithstanding he did not know of said change when signing said minutes. Such a holding subordinates the power that renders the judgment to the mercy of the clerk, unless perchance the judge discovered the change before court adjourned. It appears in this case that the trial judge did not know of the change when he signed the minutes, but, if he did, the signing could not conclude him, as to the correctness of same, as it was more than 30 days after the date of the rendition of the judgment in the case, and, under the practice act of the city court, he was powerless to correct same and could only do so in the manner subsequently attempted, and which I think was the proper and appropriate method, and do not think that the injured party should be forced to file a bill in the chancery court for the correction or cancellation of the unauthorized judgment entry.

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Damages for Permanent Obstruction.

(Decided January 18, 1912. 57 South. 434.)

Pleading; Amendment; New Cause of Action.—Section 5329 and 5367, Code 1907, did not change the law existing theretofore that an amendment could be had where it did not change the form of the action, make an entire change of parties, or introduce an entirely new cause of action; hence, where the original complaint sought damages for placing a permanent obstruction across the street in front of a lot, describing it, and the amendment offered merely changed the description of the lot and charged the same injury, it should have been allowed, although it described a totally different lot.

APPEAL from Birmingham City Court.

Heard before Hon. CHARLES W. FERGUSON.

Action by Rafaella Baranco against the Birmingham Terminal Company, for damages for obstructing a street. From a non suit occasioned by the refusal of the court to permit an amendment, plaintiff appeals.

Reversed and remanded.

FRANK S. WHITE & SONS, for appellant. The statutes found in the Code of 1907 did not change the law existing previous to their enactment. The amendment offered was not a change of parties, and introduced no new cause of action. It counted on the same injury from the same causes, and the only change was in the description of the lot.

WEATHERLY & STOKELY, for appellee. No brief reached the Reporter.

SAYRE, J.—In this case plaintiff sued for damages alleged to have been caused by defendant's wrongful act in placing a permanent obstruction across the street

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upon which his lot fronted. The averment is that the obstruction diminished the value of his property and caused a loss of profits in his business conducted thereon. Plaintiff offered to amend his complaint by changing the description of his lot. The amendment described a totally different lot, but one contiguous to that described in the original complaint. Upon the court's refusal to allow the amendment, plaintiff took a nonsuit, with a bill of exceptions.

The amendment should have been allowed. Previous to the Code of 1907 it was always held by this court that the only limitation upon the right of a plaintiff in a civil action at law to amend his complaint was that the form of the action should not be changed. There could not be an entire change of parties; nor could there be the substitution or the introduction of an entirely new cause of action.—*Mahan v. Smitherman*, 71 Ala. 563. Now it is provided that actions ex delicto may be joined in the same suit with actions ex contractu arising out of the same transaction or relating to the same subject-matter.—Code, § 5329. And in the way of further definition of those cases in which amendments must be allowed it is now provided that new counts or statements of the cause of action shall not be held to relate to new causes of action, or causes of action other than that stated in the original complaint, so long as they refer to the same transaction, property, title, and parties as the original.—Code, § 5367. The wrong complained of in this case, the gist of both the original complaint and the complaint as stated in the proposed amendment, was the same, to wit, the wrongful obstruction of the street. The allegations in respect to the diminished value of plaintiff's lot and the loss of profits which would have been earned in plaintiff's business served only to show how and to what extent the

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alleged wrong wrought injury to plaintiff different in kind and degree from that suffered by the general public. Under the statute, and the rule which has always prevailed, the amendment should have been allowed.

We have considered the question as to the propriety of the amendment, the only question presented for review. We will not be understood as intending anything in respect to other questions which will arise in the case.

Reversed and remanded. All the Justices concur, except DOWDELL, C. J., not sitting.

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Damage for Maintaining Nuisance.

(Decided December 22, 1912. 57 South. 453.)

1. *Nuisance; Private Nuisance; Right of Action.*—Under section 5198, Code 1907, the owner of property has a right of action where the defendant maintains a nuisance which results in loss of rents on such property.

2. *Same; Damages; Pleading.*—A complaint alleging that defendant maintained a planing mill in a residence portion of the city adjacent to plaintiff's residence property and that on account of the unreasonable noise and the dirt and dust deposited on plaintiff's property, she had been unable to rent it advantageously, and had suffered a diminution in rents, states a cause of action for a private nuisance sufficiently definite to be good against a general demurrer.

3. *Same; Jury Question.*—Whether the noises made by a planing mill situated in a residential portion of the city are unreasonable and a nuisance to other property, are questions for the jury.

4. *Same; Determination of Question.*—The fact that a planing mill was erected in a district already used for residence purposes constitutes a material consideration in determining whether it was a nuisance.

5. *Same; Negligence.*—Negligence, or want of ordinary care in the operation of the alleged offensive factory is not ordinarily an element of an actionable nuisance.

6. *Same.*—Where the defendant stored lumber in a building on his land adjacent to plaintiff's residence, thereby endangering plain-

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tiff's property and increasing the insurance rate thereon, plaintiff was not entitled to recover the increased premiums as damages, as the mere storing of lumber is not a nuisance *per se*; to render a building a nuisance by reason of exposure of other buildings to fire, the hazardous character of the business therein carried on must be unmistakable, and must be shown to be negligently conducted, so that injurious results are probable.

7. *Same; Damages; Wanton Injury.*—A complaint alleging that defendant, having knowledge that a district was used for residential purposes, erected and operated a planing mill therein, wantonly maintained the business and operated it, notwithstanding it had notice of the damage and injury sustained, and although requested to cease the operation of the business, does not sufficiently show wanton injury.

8. *Same.*—A complaint alleging that defendant maintained a lumber mill in a residence portion of a city adjacent to plaintiff's property, and that it negligently and wrongfully caused noise, dust, smoke, and soot to fall, go upon and be on the property of the plaintiff in such volume as to materially discomfort plaintiff's tenant and to depreciate the renting value of plaintiff's property, states a cause of action for the nuisance of smoke, dust and soot; the averments that they were negligently and wrongfully sent upon plaintiff's premises does not relieve the nuisance of its tortious character.

9. *Pleading; Demurrer; Scope.*—Where a count states a good cause of action for a nuisance, but includes allegations of damages not recoverable, the proper method to reach such defeat is by motion to strike out such allegation, by objection to evidence or requesting instructions, and not by demurrer.

APPEAL from Birmingham City Court.

Heard before Hon. CHARLES W. FERGUSON.

Action by Enola N. Harris against the Randolph Lumber Company, for damages for maintaining a nuisance. Judgment on demurrer for defendant, and plaintiff appeals. Reversed and remanded.

The complaint is as follows:

Count 1: "The plaintiff claims of the defendant \$5,000 as damages, for that plaintiff is now, and has been for several years preceding the bringing of this suit, the owner of lots 20, 21, 22, 23, and 24, in block 178, in the city of Birmingham, upon which said lots there are situated seven houses, which said houses are and have been occupied by tenants of plaintiff, and which said property is located in a residence section of the city of

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Birmingham, Jefferson county, Ala. Plaintiff avers that within the past 12 months defendant has maintained and operated a certain planing mill and sash and blind factory on lots 5 and 6, in said block 178, which said planing mill is within very close proximity to said residences, being not more than, to wit, 28 feet distant from the nearest of said houses. Plaintiff avers that said planing mill, in and about the operation and running thereof, necessarily creates a noise of such volume and character as to materially distress or discomfort the tenants of plaintiff in the enjoyment and use of plaintiff's said property as a residence, and to materially interfere with the comfort, enjoyment, and use of said property by said tenants as a residence. Plaintiff further avers that, connected with said factory, defendant has a certain lumber shed, wherein lumber is stored by defendant, on lots 1 and 2 in said block, and that only an alley of, to wit, 20 feet separates the property used by defendant for its said business and the property of plaintiff upon which said houses are located, and that by reason of the close proximity and nature of said business, and the extra hazard and risk thereby created, the insurance rate on plaintiff's said dwelling is materially increased, to wit, more than \$100 per annum. Plaintiff avers, further, that at the time of the erection of said manufacturing plant said section was a residence section, and said dwellings were used for residence purposes, and that defendant has had notice of the damage and injury sustained by plaintiff incident to the operation of its said business. Plaintiff avers that by reason and as a proximate consequence of the defendant maintaining and operating said planing mill factory, planing mill shed, and lumber in such close proximity to said dwellings, the value of her residence property has been greatly depreciated; that she has suffered and sus-

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tained a loss in the rental value thereof, and has been put to great expense in the payment of an increase in the rate of insurance, which, but for the maintaining of said business by defendant she would not otherwise have incurred, and she has been greatly annoyed, and suffered much mental and physical pain, to her damage in the sum aforesaid; hence this suit."

Second count: "Plaintiff adopts as a part of this count all the words and figures of the first, from the beginning thereof, down to and including the words, 'that defendant has had notice of the damage and injury sustained by plaintiff incident to the operation of its said business,' where said words first occur together in said count. Plaintiff further avers that defendant has been requested to abate the operation of said business and the use of said property for said purpose. Notwithstanding said notice, and notwithstanding the fact that defendant has knowledge or notice of the injury and damage that the use of said property for said purpose does and will cause plaintiff, yet defendant has, with such knowledge of the probable injury that such use by it of its said property will cause plaintiff to suffer, nevertheless wantonly maintained said business and used said property as aforesaid. Plaintiff avers that by reason and as a proximate consequence of the defendant maintaining and operating said planing mill factory, planing mill shed, and lumber in such close proximity to said dwellings, the value of her residence property has been greatly depreciated; that she has suffered and sustained a loss in the rental value thereof, and has been put to great expense in the payment of an increase in the rate of insurance, which, but for the maintaining of said business by defendant, she would not otherwise have incurred, and she has been greatly annoyed, and

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suffered much mental and physical pain, to her damage in the sum aforesaid; hence this suit."

These counts were amended by inserting in each of said counts, after the words "creates a noise," where said words first occur together in said count, the following words: "Which said noise is to the residence section unreasonable, intolerable, harsh loud, constant, and discomforting, and." Also, by inserting in said counts next after the words "such close proximity to said dwelling," where said words occur together in said count, the following words: "And of maintaining and creating said noise and disturbing said tenants as aforesaid, and of increasing the rate of insurance on plaintiff's property."

Count 3: "Plaintiff claims of defendant \$5,000 as damages, for that plaintiff is now and has been for several years the owner of lots 20, 21, 22, 23, and 24, in block 178, in the city of Birmingham, upon which said property there are situated seven houses, which are now and have been occupied by tenants of plaintiff, and which said property is located in a residence section of said city. Plaintiff avers that defendant has maintained and operated a certain planing mill and sash and blind factory in close proximity to said residences, to wit, not more than 28 feet distant from the nearest of said houses. Plaintiff avers that in and about the operation of said mill, and sash and blind factory, defendant has negligently or wrongfully caused noise, smoke, dust, and soot to fall, go upon, and be on said property of the plaintiff in such volume and character as to materially distress or discomfort the tenants of plaintiff in the enjoyment and use of plaintiff's said property as a residence, and to materially interfere with the comfort, enjoyment, and use of said property by said tenants as a residence, and which said noise, smoke, dust, and soot,

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having invaded or fallen upon said residences and plaintiff's said property, have materially interfered with the comfort, enjoyment, and use of said property by said tenants. Plaintiff further avers that in connection with said operation of said plant defendant has negligently maintained or placed a certain lumber shed, wherein lumber is stored by defendant within, to wit, 20 feet of said houses, or some of them, which said lumber is inflammable, and by reason of its close proximity and nature, and the extra hazard and risk of fire thereby created, the insurance rate on plaintiff's said dwelling is and has been materially increased, to wit, more than \$100; and plaintiff avers that by reason and as a proximate consequence of the defendant's negligently causing said noise, smoke, dust, and soot to interfere as aforesaid with the comfort and enjoyment of said tenants of their said home, and negligently causing said insurance rate to be increased as aforesaid, the value of plaintiff's property has been greatly depreciated, and she has suffered and sustained a loss in the rental value thereof, and has been put to great expense in the payment of an increased rate of insurance, which she would not have otherwise incurred, to her damage," etc.

STALLINGS & DRENNEN, for appellant. The complaint sufficiently showed the maintenance of a nuisance in the operation of the planing mill.—*Hundley v. Harrison*, 123 Ala. 292; *Richards v. Dougherty*, 133 Ala. 569; *Grady v. Wolsner*, 46 Ala. 381; 97 Am. Dec. 654; 38 Am. Dec. 568; 73 Am. Dec. 106; 108 U. S. 317; 90 Am. Dec. 181; 21 Am. & Eng. Enc. of Law, 2nd ed. 684; 25 A. & E. Enc. of Law, 2nd ed. 684; 25 Am. St. Rep. 595; 26 L. R. A. 695; 46 Am. St. Rep. 368; 50 Am. Rep. 830; 21 Am. & Eng. Enc. of Law, 2nd ed. 692. The complaint also made a proper case of nuisance from smoke, odors,

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noise etc.—*English v. Progress E. L. Co.*, 95 Ala. 264; *Rouse v. Martin*, 75 Ala. 515; *West Pratt C. Co. v. Dorman*, 49 South. 849, and authorities supra. For damages for temporary nuisance, see.—63 Ala. 266; 42 Ala. 480; 68 Ala. 280; 86 Ala. 515; 29 Cyc. 1271-7. Demurrer was not the proper way to reach non recoverable damages claimed.—*Kennon v. W. U. T. Co.*, 92 Ala. 399.

A. C. & H. R. HOWZE, for appellee. The 1st, 2nd, 5th and 9th grounds of demurrer were properly sustained.—*Hughes v. Anderson*, 68 Ala. 284; 12 L. R. A. 53; 9 L. R. A. 711; Joyce on Nuisance, sec. 11. The complaint contained non recoverable damages, and hence grounds 3 and 4 were properly sustained.—*So. Ry. v. McIntyre*, 44 South. 624; *Miller v. Edison*, 3 L. R. A. (N. S.) 1064. No damages could be recovered for the increased risk and rate of insurance, or because of piling lumber near defendant's residence.—29 Cyc. 1193; 53 Pac. 1118. In alleging nuisance it is necessary to allege facts showing a nuisance and that injury resulted.—*W. U. T. Co. v. Heathcoat*, 43 South. 119. The allegation as to smoke and soot nuisance was insufficient.—19 L. R. A. (N. S.) 174; 20 Id. 466; 17 Id. 287; 13 L. R. A. 333. The right of action was in the tenant.—Authorities supra.

SOMERVILLE, J.—The first and second counts of the complaint, as amended, show that the defendant had for 12 months preceding operated a planing mill and sash and blind factory in a residence portion of the city of Birmingham; that said mill was located in close proximity to certain residence lots belonging to plaintiff, upon which were seven houses occupied by her tenants. The gravamen of the counts is that the operation

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of said mill and factory "necessarily creates a noise of such volume and character as to create and be a nuisance and render said property undesirable for rental purposes, for which purpose alone it was adapted and suitable, and as to greatly depreciate the rental value to plaintiff of said property, and as to cause plaintiff to be unable to rent said property at the value it could and would be rented for but for said nuisance, and as to prevent plaintiff from keeping all of said houses regularly rented, and as to prevent plaintiff from keeping any of said houses rented at their full rental value, and as to injure plaintiff in her rental value of said property." It is further shown that during the 12 months mentioned plaintiff has been deprived of rent money by the reduction of some rents and the complete loss of others; the figures for each house being given in detail. The noise complained of is described as "unreasonable, intolerable, harsh, loud, and discomforting." The second count also charges notice to defendant of the injury to plaintiff, and its wanton continuance.

The third count charges that in the operation of said mill and factory the defendant "has negligently or wrongfully caused noise, smoke, dust, and soot to fall, go, and be upon said property of the plaintiff in such volume and character" as to produce the same results complained of in the first and second counts.

Demurrsers assigning numerous grounds were interposed to each of the counts, and were sustained by the trial court. The plaintiff declined to plead further, and by appeal and proper assignment of alleged errors challenges the judgment of the trial court with respect to these demurrsers to the complaint.

1. The first and second counts sufficiently state a cause of action for a nuisance. The gist of these counts is not the injury to plaintiff's tenants, but to plaintiff

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herself, as owner, in the diminution and loss of rents by reason of the discomfort imposed upon her tenants, present or prospective. Such an injury, resulting proximately from a nuisance maintained by defendant, is clearly actionable.—Code 1907, § 5198; *City of Eufaula v. Simmons*, 86 Ala. 515, 6 South. 47; 29 Cyc. 1271, 14.

Both the conduct of the defendant, and its injurious consequences, are set out with sufficient precision, and in these respects the counts are, we think, sufficient as against the grounds of demurrer assigned thereto. Whether the noises made by the operation of defendant's plant are in fact unreasonable, destructive of the ordinary comfort of nearby residents, or intolerable to them; and whether, by reason thereof, plaintiff has been injured in her property rights—are, of course, issues of fact for the jury, to be determined in view of all the facts in the case. And in this regard the allegation of the complaint that the mill of the defendant was erected in a then already residential district would be a material if not decisive consideration.—*English v. P. E. M. & L. Co.*, 95 Ala. 267, 268, 10 South. 134; *Kaufman v. Stein*, 138 Ind. 49, 37 N. E. 333, 46 Am. St. Rep. 368; *McMarron v. Fitzgerald*, 106 Mich. 649, 64 N. W. 569, 58 Am. St. Rep. 511; *Pritchard v. Edison Co.*, 179 N. Y. 364, 72 N. E. 243.

Negligence or want of due care is not ordinarily an element of nuisance, though its presence might be in itself an independent cause of action.—See *Vernon v. Wedgworth*, 148 Ala. 490, 42 South. 749.

2. There is one aspect, however, in which the first and second counts are open to an objection if properly presented. Both counts, as we have seen, are based primarily upon the noise caused by the operation of defendant's mill, and its injurious effect upon the rental value of plaintiff's premises. But in each count it is

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separately alleged that defendant maintained, in connection with its mill business, a lumber shed for the storing of lumber, and by reason of the nature of said business and its close proximity to plaintiff's buildings the insurance rates thereon are increased and plaintiff thereby damaged in a specified sum.

Whether this result is attributed to the proximity of the lumber shed alone, or of it and the rest of the plant combined, we think this part of the count is objectionable. The storing of lumber on one's premises is not *per se* a nuisance, and violates no rights of neighboring property owners. "In order to render a building a nuisance, by reason of the exposure of other buildings to danger from fire, the hazardous character of the business must be unmistakable, the danger imminent, and the use of such an *extraordinary* and *hazardous* character as to leave no doubt of the nuisance. The mere fact that the business carried on there is of a hazardous character, and largely increases the rates of insurance upon surrounding property, is not sufficient; it must appear not only that the business or use to which the building is applied is hazardous, but also that it is conducted in such a careless manner, or in such a locality, as to make injurious results probable."—1 Wood on Nuisances (3d Ed.) § 148. No facts are alleged in the complaint to stamp this building or its contents with the noxious character of a nuisance.

Any new building erected near to another would, we apprehend, increase the insurance rates on the latter; but, as declared by this court, "the law is settled, on sound reasons, that the mere fact of the diminution of the value of complainant's property, or the increased risks from hazard of fire occasioned by a structure erected by a defendant upon a lot adjoining the complainant's premises, without more, is unavailing as a

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ground of equitable relief."—*Rouse v. Martin*, 75 Ala. 510, 515 (51 Am. Rep. 463). And, we may add, it would not, without more, be actionable at law. We therefore hold that plaintiff's loss by way of increased insurance rates is not recoverable under these counts.

3. It is, however, insisted for the plaintiff that, even if the added cost of fire insurance be not recoverable as an element of damage, nevertheless a motion to strike out that part of the complaint was the only proper remedy, and that sustaining a demurrer to the entire count was improper and erroneous. Such is the rule where to a good cause of action is imputed damage for which the law allows no recovery.—*Kennon v. W. U. T. Co.*, 92 Ala. 399, 9 South. 200. "It is a general rule that a demurrer to a part of a count will not be entertained, unless the imperfect part is so material as that, being eliminated, it leaves the count without a valid cause of action. * * * The clause objected to is only one of several alleged cumulative acts of negligence, and, if it be stricken out, the count will remain amply good."—*L. & N. R. R. Co. v. Hall*, 91 Ala. 118, 8 South. 373, 24 Am. St. Rep. 863. "Where the averments of a part of a count are defective, but could be stricken out and still leave a good cause of action, the proper way to meet the defect is by motion to strike, objection to the evidence, or by requests for instructions to the jury."—*W. I. Works v. Stockdale*, 143 Ala. 553, 39 South. 336, 5 Am. Cas. 578.

In accordance with this well-settled rule, the objections to this defect could not be taken by demurrer.

The case of *Burns v. Moragne*, 128 Ala. 493, 29 South. 460, is not in conflict with this view, for there the demurrer was allowed to reach, not merely a claim for non-recoverable damages, but a claim for damages in gross for alleged breaches of official duty, laid en masse,

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some of which were not breaches of duty at all. But, whether the case were thus distinguishable or not, we would in any case feel compelled to follow the numerous authorities which plainly support our conclusion.

4. We are of the opinion that the second count does not sufficiently show wanton injury, and that the ground of demurrer pointing out this defect was properly sustained.—*Henry Case*, 139 Ala. 161, 34 South. 389.

5. The third count sufficiently states a cause of action for the nuisance of noise, smoke, dust, and soot, and the averment that these annoying agencies were “negligently or wrongfully” sent upon plaintiff’s premises does not relieve the alleged nuisance of its tortious character.

With respect to the claim for damages growing out of increased insurance rates resulting from the increased risk of fire by reason of the proximity of the lumber shed to plaintiff’s premises, we repeat what was said above in regard to similar averments in the first and second counts. The objection to this must be made otherwise than by demurrer.

It results that the demurrer was properly sustained as to the second count, and erroneously sustained as to the first and third counts. The judgment will be reversed, and the cause remanded.

Reversed and remanded. All the Justices concur, except DOWDELL, C. J., not sitting.

[Miller-Brent Lumber Company v. Lunday.]

**Miller-Brent Lumber Company
v. Lunday.***Trespass.*

(Decided February 17, 1912. 57 South. 722.)

Trespass; Personal Property; Complaint.—A complaint which alleged that plaintiff claimed of defendant a specific sum as damages for wrongfully taking the following goods and chattels, the property of plaintiff, to-wit, 3,000 pine rails and 3,000 pine boards, stated a cause of action for trespass to personal property, and is not demurrable for failing to allege the time of the trespass.

APPEAL from Andalusia City Court.

Heard before Hon. A. L. RANKIN.

Action by Henry Lunday against the Miller-Brent Lumber Company and others for trespass to land and personal property. From a judgment for plaintiff, defendants appeal. Affirmed.

The first, second, and fourth counts are in trespass to realty. The third count is as follows: "The plaintiff aforesaid claims of the defendant aforesaid the other and further sum of \$1,000 damages for wrongfully taking the following goods and chattels, the property of the plaintiff, to wit, 3,000 pine rails and 3,000 pine boards."

COLEMAN, DENT & WEIL, and HENRY OPP, for appellant. The demurrer to the 3rd count should have been sustained.—*Snedecor v. Pope*, 143 Ala. 275; *Glenn v. Garrison*, 17 N. J. L. 1; *Kendall v. Bay State B. Co.*, 125 Mass. 532; 38 Cyc. 1082; 2 1Enc. P. & P. 811.

REID & PRESTWOOD, for appellee. The complaint as to the 3rd count was for trespass to personal property, and follows the exact language of form 23, p .1199, Code

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1907, and was, therefore, sufficient. The case of *Snedecor v. Pope*, 143 Ala. 275, and the other authorities cited by appellant are cases in trespass to realty, and have no application to the case at bar:

SIMPSON, J.—The only assignment of error insisted on in this case is that the court erred in overruling the demurrer to count 3 of the complaint, and the only insistence is that said count was subject to the demurrer, in that it failed to allege the time when said trespass was committed, citing, in support of said contention.—*Snedecor v. Pope*, 143 Ala. 275, 286, 39 South. 318. That was a case of trespass to realty, and the form of complaint on page 1199 of volume 2 of the Code of 1907 (form 26) so requires. But, in the case of trespass for taking personal property, no such requirement is made; and the said count 3 is in exact conformity to form 23, on the same page of the Code.

Said count 3 is for “wrongfully taking the following goods and chattels, the property of the plaintiff, viz., 3,000 pine rails and 3,000 pine boards.” The count shows on its face that it is not for trespass to realty, but for taking personal property.—*Thornton v. Cochran*, 51 Ala. 415.

There was no error in the ruling of the court, and the judgment of the court is affirmed.

Affirmed. All the Justices concur.

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Damages for Obstructing Street.

(Decided December 21, 1911. Rehearing denied February 17, 1912.
57 South. 724.)

1. *Evidence; Judicial Notice; Public Acts.*—The court takes judicial notice of the public acts of the Legislature, although local in their application.

2. *Statute; Retroactive Operation.*—Unless the Legislature expresses a clear intention to give an act a retroactive operation, the courts will not construe the statutes so as to control or affect past matters or transactions.

3. *Nuisance; Public Nuisance; Obstruction of Street; Special Injury.*—One who suffers in person or property special peculiar injury, different in kind from that suffered by the general public on account of a public nuisance may recover damages therefor against the creator of the nuisance.

4. *Municipal Corporation; Streets; Vacation.*—Local Acts 1907, pp. 644-5, vacating certain streets and alleys in Birmingham on which the defendant railroad company had constructed its freight depot, do not evince a legislative intent to confirm or ratify the obstruction of the streets designated before the vacation thereof was accomplished by the Local Acts, and therefore, did not have the effect of taking away the right of property owners to recover damages for a nuisance arising out of such obstruction prior to the passage of said act.

5. *Same; Legislative Powers.*—The state's power is plenary in respect to the vacation of streets and highways within its borders, except as restricted by the Constitution, and hence, Local Acts 1907, p. 644, is constitutional.

6. *Same; Constitutional Limitation.*—Section 23, Constitution 1901, is the sole restraint on the state's power to vacate streets and highways within its borders; section 235, Constitution 1901, applies only to municipal and other corporations and individuals invested with the right to take property for public use.

7. *Same; Right of Abutting Owners.*—Where an adjoining property owner sought to recover damages for the obstruction of a highway by the defendant in constructing a freight depot across the same, and alleged that by reason of the obstruction his property was rendered less accessible, its prominence minimized, and the public use of the street on which it abutted deflected, lessening its value, he alleged a special injury different in kind from that suffered by the general public for which he was entitled to recover damages.

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APPEAL from Birmingham City Court.

Heard before Hon. H. A. SHARPE.

Action by G. B. Duy against the Alabama Western Railroad Company for damages for obstructing street. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

The complaint is as follows: Count 1: "Plaintiff claims of defendant the sum of \$4,000 damages by reason of the following facts, to wit: Plaintiff avers that on and before, to wit, the 15th day of August, 1906, he was owner of the following described lots or parcels of ground in Birmingham, Alabama, described as follows, to wit: Lots twelve (12) and thirteen (13) in block ninety (90) according to the present plan and survey of said city. Said lots form a rectangle 100 feet square on the northeast corner of Fifteenth street and Second Avenue North, in said city. Plaintiff further avers that on and for more than twenty (20) years prior thereto, to wit, the 15th day of August, 1906, the said Fifteenth street was a public street, and had been used by the public as such; and said street extended northwardly from First avenue, and in front of plaintiff's said lot on one of its sides, and to the limits of the said city on the north, and that the said street between First and Third avenues was much traveled by the public in going to and from First avenue, and other parts of said city, and many people passed in front of plaintiff's said lot in going to and from First avenue and other parts of said city. Plaintiff further avers that the part of said Fifteenth street, between First and Second avenues was much used by the public in passing to and from First avenue and other parts of said city, and to that part of Fifteenth street in front of plaintiff's said lot, and to that part of Second avenue in front of plaintiff's said lot. Plaintiff further avers that the value of plaintiff's

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lot is dependent on its accessibility to the public, and on the number of people and travel which pass in front of said lot. Plaintiff further avers that on or about the 15th day of August, 1906, defendant built across Fifteenth street, between First and Second avenues North, in the city of Birmingham, Alabama, a freight house, or depot, thereby permanently obstructing said street, and that the defendant since said date has used the said part of said street for its freight depot terminal, and by reason of said obstruction the said part of said street has been closed to public travel. Plaintiff further avers that the said part of said Fifteenth street so obstructed is about, to wit, 80 feet from plaintiff's said lot, above described, and diagonally across Second avenue from plaintiff's said lot. Plaintiff further avers that by reason of said obstruction in said street as aforesaid the public travel to and from First avenue and other parts of said city, as set out above, has been largely diverted from that part of Fifteenth street and Second avenue on which plaintiff's property as above described abuts, and by reason thereof plaintiff's property made less valuable, to the great damage of plaintiff as aforesaid. Plaintiff further avers that there are one or more lines of electric cars run on said First avenue, and that by reason of said obstruction in the said street said car lines are rendered less convenient and less accessible to the occupants of plaintiff's said property, thereby rendering plaintiff's said property less valuable, and greatly damaging plaintiff as aforesaid. Wherefore plaintiff sues."

The demurrers were as follows: "It appears from the complaint that the obstruction of the street complained of is a public nuisance, and the plaintiff does not show such special injury as entitles him to maintain an action for damages. It does not appear that plain-

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tiff's lot abuts on that portion of Fifteenth street which it is alleged is obstructed by defendant's freight house and depot. The complaint shows no such special injuries or damage done plaintiff as entitle him to maintain this suit. For aught that appears, plaintiff is not deprived of reasonably free access to and from said lot. It affirmatively appears that said Fifteenth street and said alleys alleged to have been so obstructed have been duly, properly, and legally vacated as public streets and public thoroughfares. No facts are set forth which give this plaintiff the right under the act of the Legislature referred to to maintain this action on account of any special injuries done to him."

Count 2 is as follows: "Plaintiff claims of the defendant the further sum of \$4,000, because heretofore, to wit, on July 5, 1877, the Elyton Land Company conveyed to the mayor and aldermen of the city of Birmingham, Alabama, certain streets, avenues, and alleys in said city for the use and benefit of the general public, and for no other purpose, and among other streets so dedicated Fifteenth street, between First avenue on the south and Fifth avenue on the north. That on and since the 15th day of August, 1906, the plaintiff has been the owner of lots 12 and 13, in block 90, according to the Elyton Land Company's survey, in said city, and has used the said property and improvements thereon for a storehouse. That the said defendant on to wit, the 15th day of June, 1907, erected and still maintains a brick freight house, a permanent structure, on said Fifteenth street, between First and Second avenues, in said city. That on July 31, 1907, the Legislature of the state of Alabama enacted an act entitled 'An act to vacate the dedication of the following alleys and part of the street in the Elyton Land Company's survey in the city of Birmingham—the alley bisecting block 94 and

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the alley bisecting block 95 and that part of Fifteenth street lying between the north line of First avenue and the south line of Second avenue, and to provide compensation for any property owner injured thereby.' Such act appears on pages 644 and 645 of the Local Acts of said state of 1907. That said act provides that any property owner who may sustain any special injury by virtue of any structure erected in or across the portion of said street or alleys vacated hereby may bring one suit against the person or corporation maintaining such structure and recover all such damages, including future damages, which he may sustain in an action at law. That said plaintiff has suffered and will suffer in the future all the damages mentioned in the first count of this complaint, which first count is hereby adopted and made a part of this count, and has also been deprived by said structures on said streets and alleys of access to and ingress from said First avenue by way of said Fifteenth street. That the approach to his said property has been thereby rendered less accessible to customers and intending customers, and that the trade of the general public has been thereby deflected or diminished, and that all access to said Fifteenth street, between First and Second avenues, has been thereby entirely cut off. That a map of said blocks 90, 94, and 95, and surrounding territory, is hereto attached, marked 'Exhibit A,' and made part of this complaint. That the red cross marked on said map indicates the freight house of said defendants on said Fifteenth street, between First and Second avenues."

The same demurrers were filed to the second as to the first count.

The local act is as follows:

1. That there is hereby vacated, and the dedication annulled of, the following described alleys and part of

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a street in the Elyton Land Company's survey of the city of Birmingham, Alabama, viz: The alley bisecting block 94 and the alley bisecting block 95, and that part of Fifteenth street lying between the north line of First avenue and the south line of Second avenue; that from and after the passage of this act, said alleys and said part of said street shall cease to be public thoroughfares.

2. Nothing contained in this act shall be held or construed as affecting or authorizing the taking, injury or destruction of property without compensation or without due process of law, but any property owner who may sustain any special injury by virtue of any structure erected in or across the portion of said street or alleys vacated hereby, may bring one suit against the person or corporation maintaining such structure and recover all such damages, including future damages, which he may sustain in an appropriate action at law brought in any court of competent jurisdiction.

3. That all laws in conflict herewith be and the same are hereby repealed.

BROWN & MURPHY, and RICHARD H. FRIES, for appellant. The court erred in sustaining demurrers to the complaint.—*Willard v. Cambridge*, 3 Allen. 574; Elliott on Roads & Streets, secs. 641 and 699; 21 A. & E. Enc. of Law, 714; Cooley on Torts, 616. The lots abutted.—*City v. Batsche*, 40 N. E. 21. Conceding they were across the street, defendant is still liable.—*Meighan v. Term. Co.*, 51 South. 775. The injury suffered by plaintiff was special and different in kind from that suffered by the public in general.—*Sloss-S. Co. v. Johnson*, 147 Ala. 384; *Sloss-S. Co. v. McLaughlin*, 55 South. --; *Douglas v. City of Birmingham*, 118 Ala. 599; *Jones v. Bright*, 140 Ala. 273. The nuisance was a public nuisance.—29 Cyc. 1152.

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PERCY, BENNERS & BURR, and BLEWETT LEE, for appellee. Private nuisance—A private nuisance is one that affects a single individual or a *determinate* number of persons in the enjoyment of some private right not common to the public.—21 Enc. of Law, 682; *Hundley v. Harrison*, 123 Ala. 292. Public nuisance—A common or public nuisance is one that affects the people at large and is a violation of a public right by direct encroachment upon public property or by doing some act which tends to the common injury, or by omitting to do in the discharge of a legal duty, that which the common good requires.—21 Enc. of Law, 683; *Hundley v. Harrison*, 123 Ala. 292. Action by an individual for a public nuisance—A private individual may have an action for damages arising from a common or public nuisance; but he must show that he has sustained a particular injury beyond that suffered by the public at large, *since the contrary rule would cause such a multiplicity of suits as to be of itself an intolerable evil*. The particular injury required is, according to numerous authorities, an injury *different in kind* from that suffered by the general public and not merely one that is greater in degree.—21 Enc. of Law, 713-714. Where a plaintiff's lot does not abut on the portion of a city street which has been obstructed or vacated, and where plaintiff's means of ingress and egress to and from this lot are not interfered with by the obstruction or vacation, plaintiff does not sustain a special injury entitling him to recover of the person maintaining the obstruction.—*Ables v. Southern Railway Co.*, 51 South. 327; *Jackson v. Birmingham Machine & Foundry Co.*, 45 South. 660, 154 Ala. 464; *Hall v. A. B. & A. R. R. Co.*, 48 South. 365; *Buhl v. Fort Street Union Depot Co.*, 23 L. R. A. 392; 98 Mich. 599; 57 N. W. 829; *Dantzler v. Indianapolis Union Street Railway Co.*, 34 L. R. A. 769; 141 Ind.

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604; *Smith v. Boston*, 7 Cushing (Mass.) 254; *Cram v. Laconia*, 57 L. R. A. 282 (New Hampshire); *Jno. K. Cummings Co. v. Deere*, 14 L. R. A. (N. S.), 822 (Mo.); *Stanwood v. Malden*, 16 L. R. A. 591 (Mass.); *Whitsett v. Union Depot Co.*, 10 Colo. 243; 15 Pac. 339; *East St. Louis v. O'Flynn*, 119 Ill. 200; 59 Am. Rep. 795; *Heller v. Atchison, etc., R. R.*, 28 Kan. 625. Whether a special injury is done a lot owner by the maintenance of an obstruction, is a question of law for the court.—*East St. Louis v. O'Flynn*, 119 Ill. 200; 59 Am. Rep. 795; *Stanwood v. Malden*, 16 L. R. A. 591 (Mass.); *Wood on Nuisances*, Section 839; *Dantzler v. Indianapolis Union Street Railway Co.*, *supra*; *Chicago v. Union Bldg. Assn.*, 102 Ill. 379; 40 Am. Rep. 598. Constitutional provisions similar to our section 235 do not give a right of action for the obstruction of streets that does not exist in the absence of such constitutional provisions. That is, there is no injury within the meaning of such constitutional provisions, unless it be a special injury.—*Ables v. Southern Railway Co.*, *supra*; *Aldrich v. Metropolitan R. R. Co.*, 57 L. R. A. 237; *McGee's Appeal*, 114 Pa. 477; *Buhl v. Fort Street Union Depot Co.*, *supra*; *Glasgow v. St. Louis*, 107 Mo. 204; *Chicago v. Union Bldg. Assn.*, 102 Ill. 379; 40 Am. Rep. 598. The act of the Legislature vacating a portion of Fifteenth street did not give a right of action unless such right existed independently of the act.—*Buhl v. Fort Street Union Depot Co.*, *supra*; *Cram v. Laconia*, 57 L. R. A. 282 (N. H.); *Stanwood v. Malden*, 16 L. R. A. 591 (Mass.); *East St. Louis v. O'Flynn*, 119 Ill. 200; 59 Am. Rep. 795. Neither the diversion of travel wont to pass plaintiff's lot, nor the rendering access to the car line less convenient constitute a special injury to plaintiff.—*Smith v. Boston*, *supra*; *Dantzler v. Indianapolis Union Street Railway Co.*, *supra*; *Stanwood v. Malden*,

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supra; Cram v. Laconia, supra; Chicago v. Union Bldg. Assn., supra.

McCLELLAN, J.—There are two counts in the amended complaint. They will be set out in the report of the appeal.

The questions to which attention is given here arise out of the action of the trial court in sustaining demurrers to these counts.

The first count seeks the recovery of damages to plaintiff's property, abutting on Fifteenth street, in the city of Birmingham, by reason of the permanent obstruction by defendant of that part of Fifteenth street between First and Second avenues and beyond, across Second avenue from the lots of plaintiff. The theory of this count is that a public nuisance, wrought by the obstruction of a public highway, inflicted special, particular damage to plaintiff's property. In this count the allegation is that the obstruction was made "on or about the 15th day of August, 1906." On July 31, 1907 (Local Acts 1907, pp. 644, 645), a local act was approved, whereby the mentioned section of Fifteenth street and two related alleys were vacated. This act, omitting the title, will be set out in the report of the appeal. Our construction of its second section will be later stated.

Independent of averment, the courts of this state take judicial notice of public acts of the Legislature, though local in application.—*Badgett v. State*, 157 Ala. 20, 48 South. 54; *McCarver v. Herzberg*, 120 Ala. 523, 25 South. 3; *Grider v. Tally*, 77 Ala. 422, 54 Am. Rep. 65.

In cases where the Legislature may enact with a retroactive effect, the courts will not construe the enactment to control or affect past transactions or matters, unless the Legislature expresses a clear intention to

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give the enactment a retroactive operation.—*Gould v. Hayes*, 19 Ala. 438, 451; *Barnes v. Mobile*, 19 Ala. 707, 709; *Smith v. Kolb*, 58 Ala. 645; *New Eng. Mort. Co. v. Board of Revenue*, 81 Ala. 110, 1 South. 30; *Wetzler v. Kelly*, 83 Ala. 440, 3 South. 747; 4 May. Dig. p. 859.

There is nothing in the mentioned local act evincing any legislative intent to confirm or ratify from its inception the obstruction described before the vacation accomplished by the local act, as was the express purpose of the enactment considered in *State ex rel., etc., v. L. & N. R. R. Co.*, 158 Ala. 208, 48 South. 391.

So the first count must, if its sufficiency upon demurrer is vindicated here, be treated as claiming damages, suffered in consequence of the public nuisance charged, between the origination thereof and the approval of the vacating act.

The second count takes express account of the vacating act, and restates the provision of the second section thereof in respect of compensation "to any property owner who may sustain any special injury by virtue of any structure erected in or across the portion of said street or alleys vacated thereby." This (second) count then enters upon an enumeration of the damages suffered and to be (in future) suffered, and includes, by adoption, the damages alleged in the first count, and adds thereto that said structures deprive the property of access to and egress from First avenue by way of Fifteenth street, that approach to his property has been thereby rendered less accessible to customers and intending customers, and that trade of the general public has been thereby deflected or diminished, and that all access to First avenue over Fifteenth street has been thereby entirely cut off. The damages alleged in the first count are diminution in value of the property because of deflected public travel by it, thereby to a large de-

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gree minimizing its prominence, and the impaired convenience and accessibility of the property to street car lines along First avenue.

In the second count the erection of the permanent structure, in the described area between First and Second avenues, is alleged to have been made by defendant "on, to wit, the 15th day of June, 1907," a date, if taken particularly, antedating the approval of the vacating act on July 31, 1907. The second section of the vacating act, particularly mentioned in the second count, did not confer, or provide for, or attempt so to do, compensation or remedy for injury to property resulting from or attending the vacation of the section of Fifteenth street and the alleys described in the act. The second section of the local act contemplated only the preservation (a work of supererogation) of the right, and but echoed therefore the legal remedy already existent, a property owner, specially injured by the nuisable characteristics or consequences of the structures erected in or across the area vacated, had to enforce recompense therefor. The public right, subject to the legitimate power of the Legislature to lift, was consistent with the dedication mentioned in the act, but an easement upon a servient estate. When that was legally extinguished by legislative declaration, the legislative power attained the limit of its rightful force and effect; and any legislative effort to deal with or to affect the use or enjoyment of the area so relieved of the burden of the public easement was a vain assumption. —*Jackson v. Birmingham F. & M. Co.*, 154 Ala. 464, 470, 45 South. 660. The second count neither charges nor relies upon any right of action arising out of the unwholesome or deleterious character or consequences of the structures erected in the area vacated as a public way by the local act. It is its quality as an obstruction

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or hindrance of which complaint is made. Under this interpretation of the second section of the vacating act, its inclusion by averment in the second count avails nothing in the assertion of a right of action by this plaintiff against this defendant.

The constitutionality of the vacating act as regards the plaintiff's property is not to be doubted. Except as restricted by the Constitution, the state's power is plenary in respect of the vacation of streets and highways within its borders.—*Jackson v. Birmingham F. & M. Co.*, 154 Ala. 464, 45 South. 660.

As to the state itself, the sole restraint in the particular now important is Const. § 23, wherein it is provided that "private property shall not be taken for, or applied to, public use, unless just compensation be first made therefor." Section 235 is addressed to the restraint of "municipal and other corporations and individuals invested with the privilege of taking property for public use." This latter section does not apply to the state itself in the exercise of its sovereign power in restraint of which, in so far as we are now concerned, Const. § 23, alone operates. It was ruled in *Jackson v. Birmingham F. & M. Co., supra*, that a property owner whose lot abutted on a street had a special, private property right in the street, which could not be taken, by a vacation of the street, without compensation, if such vacation, by the state, operated to deprive the property of a reasonably convenient means of access thereto. In the *Jackson Appeal*, as appears, consideration was alone given the validity vel non of the legislative act as affected by Const. 1875, art 1, § 24; Const. 1901, § 23. No account was or could be taken of section 25, or of its predecessor in the Constitution of 1875, for, as stated, that section of the Constitution did not restrict the state itself in the exercise of its power in the

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premises. The doctrine of the *Jackson Appeal* was restated in *Hall v. A. B. & A. R. R. Co.*, 158 Ala. 271, 48 South. 365, though the ruling was inadvertently referred to section 235 of the Constitution. And this decision (*Jackson v. Birmingham F. & M. Co.*) was again referred to in *Meighan v. Birmingham Terminal Co.*, 165 Ala. 591, 599, 600, 51 South. 775, where, in treatment of charge 2, it was said that the "language was taken from the opinion" in *Jackson's Appeal*, and the use of the word "aesthetic" was said to be "open to verbal criticism." The word ("aesthetic") as employed in the mentioned charge, was subject to the criticism put upon it; but in the grammatical connection, materially different, in which it was used in the opinion mentioned (*Jackson's Appeal*), it was not open to that criticism, for it there qualified the noun "taste" which was the subject of the verb "allowed." As employed in the opinion in *Jackson's Appeal*, "aesthetic" did not refer to "convenience of way." The expression, in the opinion in *Jackson's Appeal*, was aptly incorporated in limitation of the generally stated private right of access, therein before considered, succinctly reiterated in *Hall v. A. B. & A. R. R. Co., supra*. It affirmatively appears from the map exhibited with the second count that the legislative vacation of the described section of Fifteenth street and of the related alleys did not infringe upon the private right of access stated in the opinion in *Jackson's Appeal, supra*. So, the second count must be treated as claiming compensation for a like wrong to that asserted in the first count, viz., for the obstruction of the public way between the creation of the obstruction, as alleged in the second count, and the date of approval of the vacating act.

One who suffers, in person or property, special peculiar injury in consequence of a public nuisance, has his

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action in damages therefor against the creator thereof; but, if his injury be only that common to the public, he has no right of action, for he has suffered no injury of his private right.—Elliott on Roads & Streets, § 669, and citations, notes thereto; *Birmingham R. L. & P. Co. v. Moran*, 151 Ala. 187, 44 South. 152; *Dennis v. M. & M. Ry. Co.*, 137 Ala. 649, 658, 35 South. 30, 97 Am. St. Rep. 69; *Sloss-Sheffield S. & I. Co. v. Johnson*, 147 Ala. 384, 41 South. 907, 8 L. R. A. (N. S.) 226, 119 Am. St. Rep. 89, 11 Ann. Cas. 285; *Jones v. Bright*, 140 Ala. 268, 37 South. 79; full note to *Stetson v. Faxon*, 31 Am. Dec. 123, 132, 135; and notes to 5 Am. Dec. 18-21. Judge Freeman's conclusion in the pertinent particular in the note to *Stetson v. Faxon*, 19 Pick. (Mass.) 147, 31 Am. Dec. 123, is approvingly referred to in *S.-S. S. & I. Co. v. Johnson*, *supra*. Whether the individual property owner seeks equity's power to abate a public nuisance created by the obstruction of a highway, or impleads the obstructor of the highway in a court of law to respond in damages suffered in consequence of the obstruction, the fundamental principle inheres in the right he would in each instance assert and vindicate, namely, that the obstruction has inflicted special, peculiar damage upon him, different from that inflicted upon the public. If the wrong to him is only that common to the public, he is without individual right to assert or vindicate; and his cause, in either tribunal, must fail, for the public wrong suffered cannot be redressed or its cause removed by an individual who has not been specially, peculiarly damaged thereby.—Author., *supra*. Reference to many of the decisions of eminent courts dealing with the question in concrete cases, whether the property owner has suffered special, peculiar damage in consequence of the obstruction of a highway, whereby ingress and egress to the property has not been entirely

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cut off, but the traversing of a circuitous route is thereby compelled, discovers a marked inharmony even where the status was, in substance, the same. In *Williams' Case*, 3 Coke's Rep. 73, it was pertinently said: "A man shall not have an action on the case for a nuisance done in the highway, for it is a common nuisance, and then it is not reasonable that a particular person should have the action; for by the same reason that one person might have an action for it, by the same reason every one might have an action, and then he would be punished 100 times for one and the same cause. But, if any particular person afterwards by the nuisance done has more particular damage than any other then, for that particular injury, he shall have a particular action on the case. * * *

This statement is quoted and strongly approved for its directness, simplicity, and readiness of application in the note to *Stetson v. Faxon, supra*; and this court has approved the conclusion there drawn by the learned editor in *Jones v. Bright* and *S.-S. S. & I. Co. v. Johnson, supra*, and in the latter decision it was ruled that an enforced circuity of route from the property owner's location to the outside world wrought a special, peculiar injury to him. To like effect was the ruling in *Jones v. Bright, supra*. No distinction in principle can in our opinion be taken in respect of the specialty of the injury to the property owner between cases where circuity of route to the outside world and consequent diminution of value of his property is the result of the obstruction of the highway, and cases where, as is here alleged, the obstruction minimizes the prominence of a property by deflecting the popular use of the way on which it abuts, and thereby, it may reasonably be alleged, lessening its value. Such a state of injury must be special, peculiar to the owner of the property. It is

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a particular injury within the quoted doctrine of the *Williams Case*, *supra*; and accords with the therewith consistent ruling in our cases of *Jones v. Bright* and *S.-S. S. & I. Co. v. Johnson*, *supra*, and the authorities therein cited, and with the express ruling made in *Sloss-Sheffield Steel & Iron Co. v. McLaughlin*, 173 Ala. 76, 55 South. 522, delivered since the foregoing opinion was prepared. The rulings made on the several appeals in *Southern Railway Co. v. Ables*, 153 Ala. 523, 45 South. 234, and *Ables v. Southern Ry. Co.*, 164 Ala. 356, 51 South. 327, *Id.*, 55 South. 816, are not, the court holds, opposed to the conclusion now expressed. That other properties are thereby likewise injuriously affected does not render the injury any the less special or particular.

—29 Cyc. p. 1213.

In the light of these considerations, the counts of the amended complaint were not subject to the demurrer interposed thereto, since each sufficiently set forth a cause of action for damages in consequence of the obstruction of the street before the vacating act was approved July 31, 1907.—*Meighan v. Birmingham Terminal Co.*, 165 Ala. 591, 51 South. 775; *Sloss-Sheffield S. & Iron Co. v. McLaughlin*, 173 Ala. 76, 55 South. 522.

The judgment is therefore reversed and the cause is remanded.

Reversed and remanded.

SIMPSON, ANDERSON, SAYRE, and SOMERVILLE, JJ., concur. DOWDELL, C. J., not sitting. MAYFIELD, J., dissents.

ON REHEARING.

PER CURIAM.—Upon full consideration of the argument submitted in support of the application for rehearing, the court feels constrained to overrule it, and the rehearing must, therefore, be denied.

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No ruling of the trial court touching the measure of damages is presented on this appeal for review. The court cannot hence consider at this time the matter of measure of damages. It is proper, however, that it be stated, though necessarily a reiteration, that permanent injury or damage to the plaintiff's property is not recoverable, since the street and alleys were vacated by the vacating act, thus and then relieving the freight house of its character as an obstruction in a public street.

MAYFIELD, J.—(dissenting.)—I cannot concur in the conclusion or decision in this case. There are many propositions of law well stated in the opinion, but of these none in my judgment will warrant the conclusion reached, that both counts of the complaint state a cause of action, and are not subject to the demurrer.

Counsel for appellant and for appellee state and concede in their briefs that the trial court sustained the demurrer to the complaint under the authority of the *Albes Case*, which has been twice considered by this court. In my judgment the counts were properly held bad by the trial court under the decisions in that case, as well as under the great weight of authorities, both English and American. There are some cases which support the conclusion reached in this case, but in my opinion those cited do not support it, as I shall attempt to point out.

It will be observed that the only damages or relief sought in this case was for depreciation in value of two lots, each 50x100 feet, on account of an obstruction in a street some distance from these lots. The rule, as I understand it, and as I think the majority opinion concedes it to be, is this: "In order that an individual may maintain an action for a public nuisance, he must show

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that he thereby suffers a particular, direct, and substantial injury, different in kind from that suffered by the public. It must be beyond the general injury suffered by the public, and his damage must be direct and substantial, and not merely consequential.—*Benjamin v. Storr*, L. R. 9 C. P. 401, 409; 43 L. J. C. P. 169; 19 Eng. Rul. Cas. 263.” The only damages sought to be recovered in this case are purely and solely consequential. They are not claimed to be direct or different in kind from those suffered by the public. The obstruction does not touch plaintiff’s property. The ingress and egress to and from his property are not obstructed or impeded. It is the ingress and egress as to other property or other parts of the city that are obstructed; yet consequent damage to the property in question is claimed. The complaint shows that there are two streets, open and unobstructed, in front of this property; and that the obstruction while in one of these streets is in a block different from that in which plaintiff’s property is situated. There is no attempt in this case to recover as for damages to a trade or to an occupation, but merely as for damages sustained in the diminished value of the lots. The first count does not allege that the lots are occupied. It is true that the counts allege that, by reason of the obstruction, the travel of the public is diverted from the streets in front of plaintiff’s lots, and that, in consequence thereof, the value of these lots has been greatly decreased; yet for this very reason the damages sought to be recovered are consequential—not direct—and are therefore not recoverable.

As shown by all the authorities, the rules are different in actions brought to recover compensation for lands taken or injured by reason of the nuisance from those in actions brought to recover damages purely per-

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sonal, such as damages to trade, personal injuries, cost and expense of removing, avoiding, etc. The rule is well and fully stated in the leading English case, above referred to, as follows: "The cases referred to upon this subject show that there are three things which the plaintiff must substantiate, beyond the existence of the mere public nuisance, before he can be entitled to recover. In the first place, he must show a particular injury to himself beyond that which is suffered by the rest of the public. It is not enough for him to show that he suffers the same inconvenience in the use of the highway as other people do, if the alleged nuisance be the obstruction of a highway. The case of *Hubert v. Groves*, 1 Esp. 148, seems to me to prove that proposition. There the plaintiff's business was injured by the obstruction of a highway, but no greater injury resulted to him therefrom than to any one else, and therefore it was held that the action would not lie. *Winterbottom v. Lord Derby*, L. R. 2 Ex. 316, was decided upon the same ground. The plaintiff failed because he was unable to show that he had sustained any injury other and different from that which was common to all the rest of the public. Other cases show that the injury to the individual must be direct, and not a mere consequential injury, as where one way is obstructed, but another (though possibly a less convenient one) is left open. In such a case the private and particular injury has been held not to be sufficiently direct to give a cause of action. Further, the injury must be shown to be of a substantial character, not fleeting or evanescent. If these propositions be correct, in order to entitle a person to maintain an action for damage caused by that which is a public nuisance, the damage must be particular, direct, and substantial."—19 Eng. Rul. Cas. 270. I submit that, under these authorities, the complainant

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in this case shows no right of recovery. Where damages to realty are sought, the injury must be direct and attinent to the land itself, not remote or consequential, as is shown in this case. If it be injury personal, to business or to trade, then the nuisance may be more or less remote. If the nuisance complained of in such case be an obstruction of a highway, then, as to personal damages, the obstruction need not abut plaintiff's property, provided the injury can be shown to be the direct and not the consequential result of the nuisance, and different in kind from that suffered by the public similarly situated. There is, and can be, no difference between a suit like this, where the private damages sought to be recovered as for a public nuisance are to the land only, and actions for damages to land taken or "injured," for public purposes, by virtue and authority of law, constitutional or statutory. It has been repeatedly decided by the English and American courts that such statutes or constitutional provisions are intended to give the right of action as to the land which the owner would have had, but for the act of Parliament or of the Legislature authorizing the taking or injuring of property. So, if the injury is private, and it is to land only, then, of course, the same rules of law must apply, whether the injury to, or the taking of, the land, was lawful or unlawful, except as to punitive damages; which might be allowed in the one case and not in the other. In other words, if a street or a road is so obstructed as to prevent its use as a highway, and the value of the land in the vicinity is thereby depreciated, it is immaterial, under our Constitution and statutes, so far as private actions can be maintained solely for depreciation in value of such land on account of the obstruction, whether the obstruction is authorized or not. If the act obstructing or vacating was authorized by law, then the

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Constitution and statutes allow the same recovery as for injury to the land as the owner would have had, if the obstructing or vacating had not been authorized; but, as to personal injuries not connected with the land, the constitutional provision and statutes do not apply. It is only damages to the specific property which is taken or injured that are saved to the owner; but those so saved are the same as he would have had but for the authorized taking or injury.

Having quoted from the leading and ruling English case upon this subject, it may be well to give the leading and ruling American cases. The leading American case upon the subject is conceded by the text-writers and annotators to be that of *Smith v. Boston*, 7 *Cush.* (Mass.) 254, the opinion therein being written by that great jurist, Chief Justice Shaw. From this opinion I quote: "The court are of opinion that the direction given by the judge at the trial was correct, and that the inconvenience sustained by the petitioner, if any, was not such an injury done him in his property, as to entitle him to damages within the true intent of the law. There is obviously a difficulty in laying down a general rule applicable to all cases. One limit, however, must be observed, which is that the damage for which a recompense is sought must be the direct and immediate consequence of the act complained of, and that remote and contingent damages are not recoverable. The inconvenience of the petitioner is experienced by him in common with all the rest of the members of the community. He may feel it more in consequence of the proximity of his lots and buildings; still it is a damage of like kind, and not in its nature peculiar or specific. The creation of a public nuisance by placing an obstruction in a highway can only be punished and suppressed by a public prosecution; and though a man who lives

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near it, and has occasion to pass it daily, suffers a damage altogether greater than one who lives at a distance, he can have no private action, because in its nature it is common and public. But if he suffers a peculiar and special damage, not common to the public—as by driving upon such an obstruction in the night, and injuring his horse—he may have his private action against the party who placed it there." Further on, in the same opinion, the great chief justice says: "We do not mean to be understood as laying down a universal rule that in no case can a man have damages for the discontinuance of a highway unless his land bounds upon it, although as applicable to city streets, intersecting each other at short distances, it is an equitable rule. A man may have a farm, store, mill, or wharf, not bounding on a street, but communicating with it by a private way, so situated that he has no access to his property but by the public way. If this is discontinued, he must lose the benefit of his estate, or open a way at his own expense, which might be a direct and tangible damage, consequent upon the discontinuance of the public way, and we are not prepared to say that he would not have a claim for damages under the statute." The two and only Alabama cases which can be said to support the decision in the case at bar are those of *Jones v. Bright*, 140 Ala. 268, 37 South. 79, and *Johnson's Case*, 147 Ala. 384, 41 South. 907, 8 L. R. A. (N. S.) 226, 119 Am. St. Rep. 89, 11 Ann. Cas. 285, and each of those clearly fell within the exceptions mentioned by Chief Justice Shaw. The nuisance complained of in each of those cases was clearly a private as well as a public one, and the opinion in each is expressly put upon the ground that the nuisance was a private, as well as a public one.

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I do not think that any one ever did or could contend upon the facts in the case at bar that the nuisance complained of is one peculiar to the plaintiff or to any other person. The case at bar indisputably falls within the general class, in which the English judges and Chief Justice Shaw say there can be no private action as to the public nuisance. To be sure of this, let us see what the later judges of these same great courts say of the English and American leading cases above quoted from. Justice Bigelow, in the case of *Brainard v. Connecticut River Co.*, 7 *Cush.* (Mass.) 510, 511, said: "It is only when he suffers some special damage, differing in kind from that which is common to others, that a personal remedy accrues to him; and certainly no rule of law rests on a wiser or more sound policy. Were it otherwise, suits might be multiplied to an indefinite extent, so as to create a public evil, in many cases much greater than that which was sought to be redressed.—*Stetson v. Faxon*, 19 *Pick.* 147 [31 *Am. Dec.* 123]; *Proprietors of Quincy Canal v. Newcomb*, 7 *Metc.* 276 [39 *Am. Dec.* 778]; *Smith v. Boston*, ante [7 *Cush.*] 255. The same rule is recognized and applied in cases where equitable relief is sought, as well as law. A recent case in England—*Soltau v. De Heild*, 2 *Simons, N. S.* 133—contains a full discussion of this subject, and the authorities sustaining it are fully reviewed in the elaborate judgment of the vice chancellor." In *Stanwood v. Malden*, 157 *Mass.* 17, 31 *N. E.* 702, 16 *L. R. A.* 591, the headnote, which clearly states the question decided, is as follows: "The discontinuance of a part of a street in a city is not a ground of action by an owner of land on another street, into which, opposite his land, the part of the street discontinued runs obliquely, if the means of access to his estate remain ample, although its money value is

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diminished by the diversion of travel; and it is immaterial that a small point of land, of which he owns the fee simple subject to the public right of way, touches the discontinued parts of the street." The case of *Harvard College v. Stearns*, 15 Gray (Mass.) 1, was an action for damages for obstructing a highway, in which, as in the case at bar, the damages claimed were solely for the depreciated value of the premises due to closing of access. The lower court instructed the jury that such damages were not recoverable, and the Supreme Court of Massachusetts, after reviewing the authorities on the subject, concluded as follows: "If we now turn to the case before us, it will be found that the claim of the plaintiffs is solely for the injury to their land in consequence of the alleged obstruction. The brief of the plaintiffs' counsel puts the case thus: 'The injury which the plaintiffs sue for is the reduction in value of their land, because not only the servants of the plaintiffs, but others, cannot approach it by water.' No evidence appears to have been offered, or any claim set up, or instructions asked of the court, upon the ground of any particular actual hindrance or delay to the plaintiffs, or obstruction in reference to any case of actual intended use of their land by passing through the creek. The claim was for injury to their land by reason of an obstruction placed in a navigable stream or public way, whereby their land would be rendered more difficult of access and less valuable. Upon the case as presented, the court are of opinion that no exception lies to the instruction given."

In the case of *Aldrich v. Metropolitan W. S. Elev. R. Co.*, 195 Ill. 456, 63 N. E. 155, 57 L. R. A. 237, a case very much like this, the court said: "There are certain injuries which are necessarily incident to the ownership of property in towns or cities, which directly im-

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pair the value of private property, for which the law does not and never has afforded any relief. For instance, the building of a jail, police station, or the like will generally cause a direct depreciation in the value of neighboring property, yet that is clearly a case of *damnum absque injuria*. So as to an obstruction in a public street, if it does not practically affect the use or enjoyment of neighboring property, and impair its value, no action will lie. In all cases, to warrant a recovery, it must appear that there has been some direct physical disturbance of a right, either public or private, which the plaintiff enjoys in connection with his property, and which gives to it an additional value, and that, by reason of such disturbance, he has sustained a special damage with respect to his property in excess of that sustained by the public generally. In the absence of any statutory or constitutional provision on the subject, the common law afforded redress in all such cases, and we have no doubt it was the intention of the framers of the present Constitution to require compensation to be made in all cases where, but for some legislative enactment, an action would lie by the common law. Here there has been no direct physical disturbance of any right, public or private, which the plaintiff enjoys in connection with her property, and which gives to it an additional value, whereby she has sustained a special damage in excess of that sustained by the public generally. The damages sued for are of the same kind and character as those sustained by the public generally in the ownership of property, which property may have been lessened in value by the construction and operation of the road."

In my opinion the case at bar cannot be distinguished from the *Case of Albes*, twice considered by this court. While one was a suit in equity and the other an

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action at law, the facts and the rights of the parties are substantially the same. If Albes and Jackson were not entitled to damages in the cases cited in the majority opinion, I fail to see how this plaintiff has shown any greater or different right. If this plaintiff can recover in this action under the facts stated, then it is certain that there is no end to the suits that may be brought for this alleged public nuisance. The courts will be absolutely flooded with actions as for this one wrongful act. From the plaintiff's complaint it appears that, if his two lots were damaged as he alleges, then all other lots in that vicinity—hundreds if not thousands—were damaged like this, more or less, of course, according to their proximity to the obstruction. If a public highway, such as a river or a public road, should be obstructed at one point, is it possible that all landowners upon such highway whose property may be thereby depreciated in value may maintain actions, either at common law, or under the statutes and constitutional provisions? I think not; but in my opinion the effect of this decision is to hold that they can. I concede that, if they abut the obstructed part, they can; that, if they or their property is thereby put in a cul-de-sac, they can; or that, if their ingress and egress to and from their property is thereby cut off, they can maintain such action, or that if they suffer any direct damages, different in kind from that suffered by the public, they have their action as to such damages; but they have no right of action as for consequential damages to their property—such only as are shown in the case at bar—which are not at all different in kind, though they may be, in a degree, from those suffered by the public.

Meighan's Case, 165 Ala. 591, 51 South. 775, is clearly distinguishable from that at bar, and falls within the class of *Albes' Case*; and from the report of it (page

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593 of 165 Ala., page 776 of 51 South.) it appears that the obstruction complained of was "immediately next to where plaintiff's lot abuts thereon," thus making it an entirely different case from that here under consideration. This point of difference is the very reason, as said in *Albes' Case*, that makes the damages recoverable —that is, that they are direct, attinent, and different in kind from those suffered by the public and by owners whose property does not abut upon the part of the street vacated or obstructed.—*McLaughlin's Case*, 173 Ala. 76, 55 South. 522, is the counterpart of *Johnson's Case*, above referred to, and is expressly placed upon the latter as an authority. There the obstruction was upon two sides of the property, thus putting it in a cul-de-sac and shutting off plaintiff's way to the city of Birmingham, her property being on the outskirts of the city, which fact clearly made the plaintiff's damages different in kind from those suffered by the public. Moreover, *McLaughlin's* and *Johnson's Cases*, and that of *Jones v. Bright*, were suits in equity to abate a nuisance which was obviously both a public and a private one as to the complainants, in that they had the individual and personal right to have the obstruction removed, so as to give them a right of way to market and to communicate with the outside world. While not a "way of absolute necessity," it was one special and personal to the complainants in those cases; and hence the bills in those cases had equity independent of the question of damages to the land. In fact, in those cases it was the question of right of way to be protected, rather than that of damages to be recovered.

The statutes and constitutional provisions applicable to this case are not in abrogation of the plaintiff's common-law rights, but they are in this particular case (the statute specially) declaratory of his common-law

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rights; and how it results that he can recover under his common-law rights, but not under constitutional rights, I am not able to understand. It may be that I fail to comprehend the true holding of the majority opinion; but, as I understand it, it holds that plaintiff may recover under his common-law right but not under the statute, and I think the statute declaratory of his common-law rights.

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Damage for Loss of Goods.

(Decided January 16, 1912. 57 South. 380.)

1. *Commerce; Interstate; Regulation.*—Acts 1907, p. 225, is violative of article 1, section 8, Constitution of United States, in so far as it may affect cars which may be needed in interstate commerce, or may be used therein, so that they cannot be supplied.

2. *Same; Police Power of States.*—The grant to Congress of the power to regulate interstate commerce, in the absence of action by Congress, does not deprive the states of their police power to impose reasonable regulation on interstate carriers for the protection of the lives, health and safety of the people.

3. *Courts; Decisions; Federal Question.*—A decision by the Supreme Court of the United States that a state statute is an interference with interstate commerce, is binding on the state court.

4. *Statutes; Construction; Validity.*—If there is reasonable doubt as to the validity of the statute the doubt should be resolved in favor of its validity.

Certified question from the Court of Appeals.

Action by Groesbeck & Armstrong against the Central of Georgia Railway Company, for failure to furnish cars to ship goods. Judgment for plaintiff and defendant appeals to the Court of Appeals, which certified the question decided to the Supreme Court. Question answered.

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STEINER, CRUM & WEIL, for appellant. No brief reached the Reporter.

R. D. CRAWFORD, for appellee. No brief reached the Reporter.

MAYFIELD, J.—The Court of Appeals have submitted or referred to us the following constitutional question:

"Under the provisions of the statute (Act approved April 18, 1911 [Acts 1911, p. 449] § 1), the following question is hereby submitted to the Supreme Court for determination:

"Are the provisions of the act of the Legislature of Alabama approved February 28, 1907 (Acts 1907, p. 225), providing a penalty to be imposed on railroad companies for failure to deliver freight cars to prospective shippers within a specified time after demand made, violative of or in conflict with that clause of the Constitution of the United States which provides that 'Congress shall have power to regulate commerce with foreign nations and among the several states,' etc. (Const. U. S. § 8, art. 1.), or that provision of the Constitution of the United States which provides that no person shall be deprived of property without due process of law (Const. U. S. art 14 [fourteenth amendment] § 1)?"

We answer that so much of the provisions of the act in question as imposes a penalty on railroad companies for failure to deliver freight cars to prospective shippers within a specified time after demand is made, is, under the decisions of the Supreme Court of the United States (which, of course, control us in this decision), violative of section 8, art. 1, of the Constitution of the United States.

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The states possess the power to protect the public health, the public morals, and public safety by any legislation, appropriate to those ends, which does not encroach upon any rights guaranteed by the national and state Constitutions. The mere grant to Congress of the power to regulate interstate commerce did not, of itself and without legislation on the part of Congress, impair the right or authority of the states to establish such reasonable regulations as were appropriate for the protection of the health, the lives, and the safety of the people. The police powers of the state, as great and broad as they are, cannot be exercised, as the Supreme Court of the United States has often decided, in regard to a subject which has been exclusively confided to Congress by the Constitution of the United States. If a state statute invades the domain of legislation which thus belongs by virtue of the national Constitution to Congress, it is void, no matter under what class of powers it may fall, nor how closely allied it may be to powers conceded to belong to the states.—*Henderson v. New York*, 92 U. S. 271, 23 L. Ed. 543; *Smith v. Turner*, 7 How. 408, 12 L. Ed. 702; *Hannibal v. Husen*, 95 U. S. 473, 24 L. Ed. 527; *Brennan v. Titusville*, 153 U. S. 299, 14 Sup. Ct. 829, 38 L. Ed. 719.

And what is and what is not an interference with or regulation of interstate commerce is a question for the final decision of the Supreme Court of the United States, and as to which state courts must yield. The Supreme Court of the United States, in the case of *Houston & Texas Central Railroad Co. v. Hayes*, 201 U. S. 321, 26 Sup. Ct. 491, 50 L. Ed. 772, has construed a Texas statute very much like the one in question, and held that it was void, because in violation of the commerce clause of the federal Constitution. The headnotes to that case read as follows:

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"An absolute requirement that a railroaad engaged in interstate commerce shall furnish a certain number of cars on a specified day to transport merchandise to another state, regardless of every other consideration except strikes and other public calamities, transcends the police power of the states and amounts to a burden upon interstate commerce; and articles 4497-5000, Rev. Stat. Texas, being such a requirement, are, when applied to interstate commerce shipments, void as a violation of the commerce clause of the federal Constitution.

"Such a regulation cannot be sustained as to interstate commerce shipments as an exercise of the police power of the state."

It was also held in that case that, until Congress had passed laws regulating interstate commerce, the state could pass reasonable laws as to such subject; but, since Congress had passed laws in minute detail upon the subject, the states were no longer entitled to exercise the power. The court, however, in striking down the Texas statute, said, among other things: "While there is much to be said in favor of laws compelling railroads to furnish adequate facilities for the transportation of both freight and passengers, and to regulate the general subject of speed, length and frequency of stops, for the heating, lighting, and ventilation of passenger cars, the furnishing of feed and water to cattle and other live stock, we think an absolute requirement that a railroad shall furnish a certain number of cars at a specified day, regardless of every other consideration except strikes and other public calamities, transcends the police power of the state and amounts to a burden upon interstate commerce. It makes no exception in cases of a sudden congestion of traffic, an inability to furnish cars by reason of their temporary and unavoidable detention

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in other states, or in other places within the same state. It makes no allowance for interference of traffic occasioned by wrecks or other accidents upon the same or other roads, involving a detention of traffic, the breaking of bridges, accidental fires, washouts, or other unavoidable consequences of heavy weather." "While railroad companies may be bound to furnish sufficient cars for their usual and ordinary traffic, cases will inevitably arise where by reason of an unexpected turn in the market, a great public gathering, or an unforeseen rush of travel, a pressure upon the road for transportation facilities may arise, which good management and a desire to fulfill all its legal requirements cannot provide for, and against which the statute in question makes no allowance." This decision has been followed in a number of cases, and statutes and regulations of railroad business, similar to the Texas statute, have been stricken down.—See *Southern Ry. Co. v. Commonwealth*, 107 Va. 771, 60 S. E. 70, 17 L. R. A. (N. S.) 364; *McNeill v. Southern R. Co.*, 202 U. S. 543, 26 Sup. St. 722, 50 L. Ed. 1142; *St. Louis, I. M. & S. R. Co. v. Hampton* (C. C.) 162 Fed. 693.

We are unable to see how the statute in question can stand, under the rules of law announced by the Supreme Court of the United States and above quoted. Recognizing the rule of construction, that statutes should never be stricken down by courts, if there is a reasonable doubt as to their validity, we have endeavored to distinguish this statute from the Texas statute condemned in the above case; but we have been unable to do so.

All concur save DOWDELL, C. J., not sitting.

[Robinson v. Crotwell.]

Robinson v. Crotwell.*Malpractice.*

(Decided December 21, 1911. 57 South. 23.)

1. Physician and Surgeon; Civil Liability; Care and Skill Required.—A physician is civilly liable for injuries caused by a failure to exercise such reasonable care and skill as physicians in the same general neighborhood, and in the same general practice ordinarily exercised in like cases.

2. Same.—Although a patient had a temperamental or physical weakness which could not be foreseen and which contributed to the failure of an operation performed by a physician sued for malpractice, the physician was liable if he contributed to plaintiff's injury by a failure to exercise due care and skill or by performing on the patient a serious operation without his knowledge or consent.

3. Same; Instructions.—In an action against a physician for malpractice, a charge asserting that no matter how skillful a physician may be, he is responsible for his negligence, if any, merely states the proposition that no degree of skill on the part of the physician will relieve him of the responsibility for the consequences of a tortious failure to exercise such skill, and is not objectionable as holding the physician responsible for his negligence, without limiting the responsibility to the proximate result of such negligence.

4. Same.—In an action for malpractice, an instruction that a physician is bound to give his patient the benefit of his best judgment, but is not liable for an error of judgment, is properly refused as failing to require any skill of the physician.

5. Same.—Where there was no pretense that the physician had by malpractice induced plaintiff's disease, but, except for the disease, plaintiff would not have suffered the injurious consequences of an operation performed without his consent or without the exercise of due care, a charge asserting that there could be no recovery for the injuries sustained by plaintiff by reason of the disease with which he was afflicted, was properly refused as misleading.

6. Same; Instructions.—In an action for malpractice a charge which places on plaintiff the burden of proving a certain aspect of his case as a condition to recovery while plaintiff's pleading and evidence proceeded on another and entirely different alternative theory which entitled him to a verdict without reference to the aspect of the case dealt with in the instruction, was properly refused.

7. Same; Evidence.—Where the action was for malpractice based on the ground that defendant caused a dangerous operation to be performed on plaintiff after assuring him that the operation would be a mere trifle, and would involve no serious consequence, the evidence examined and held not to support a verdict for plaintiff.

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8. *Hospitals; Malpractice; Liability.*—A physician owning a hospital is not liable for failure to furnish an adequately equipped place in which a surgeon may operate on a patient with safety; the responsibility for the sufficiency of the equipment resting on the surgeon performing the operation.

9. *Same.*—Where a physician kept a hospital and treated a patient for several years, advising an operation and procuring a skilled surgeon to perform the operation for compensation agreed on to be paid by the patient, and such physician took part in the operation to the extent only of administering the anaesthetic, and advising that the effort to complete the operation be abandoned on account of the patient's ebbing vitality, and there was no suggestion that the physician showed any lack of skill, or committed any error, or that he negligently advised the employment of an incompetent surgeon, such physician was not liable for any default on the part of the surgeon who practiced his profession as an independent agent.

10. *Evidence; Expert; Weight.*—The jury is not, as a matter of law, required to accept the conclusion of an expert witness, but must determine for themselves the weight to be accorded to such testimony and base their verdict on their own judgment of the facts.

11. *Charge of Court; Abstract Instructions.*—Error to reversal cannot be predicated on the giving of merely abstract instructions unless they mislead the jury to the prejudice of the party complaining.

12. *Same; Ignoring Issues.*—A charge directing a verdict for defendant on one aspect of the case, and ignoring plaintiff's contention which found support in the evidence, was properly refused.

13. *Same; Invading Jury's Province.*—An instruction assuming fact contrary to the evidence is properly refused for that reason.

14. *Same.*—An affirmative charge on the whole case is properly refused where the evidence is conflicting, although on the whole evidence, plaintiff's case is so unproven that a verdict for him could not stand.

15. *Same; Burden of Proof.*—A charge asserting that if, after considering all the evidence, the minds of the jury remain in an unsettled state on the issue, the verdict must be for defendant, was not erroneously refused, the word "settled" implying that the mental state to which it is applied has become fixed, permanent and not subject to change.

APPEAL from Bessemer City Court.

Heard before Hon. J. C. B. GWIN.

Action by William T. Crotwell against Thomas F. Robinson for malpractice. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

The counts referred to in the complaint as having gone to the jury are as follows:

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“(3) The plaintiff claims of the defendant \$50,000 damages, for that heretofore, to-wit, in March, 1909, defendant held himself out as a surgeon, and as such undertook for hire and reward to perform a particular operation upon the plaintiff, and by means of the confidence engendered by said operation, and defendant's undertaking to perform said operation, plaintiff subjected himself to defendant's control, and defendant, on the 8th day of March, 1909, wrongfully performed another and different operation upon the plaintiff, without the plaintiff's consent, and as a proximate consequence thereof plaintiff has suffered the injuries and damages as set out in the first count.

“(4) Plaintiff claims of the defendant \$50,000 damages, for that heretofore, to-wit, on the 8th day of March, 1909, defendant wrongfully and without the consent of the plaintiff removed a large part of plaintiff's skull, and as a proximate consequence thereof plaintiff suffered the injuries and damages set out in the first count of the complaint.

“(5) Plaintiff claims of defendant \$50,000 damages, for that heretofore, to-wit, on the 8th day of March, 1909, defendant held himself out as a practicing surgeon, and together with another or other physicians or surgeons undertook to diagnose and treat plaintiff surgically for hire and reward; that it then and there became and was the duty of the defendant to exercise due care, skill, and diligence in the diagnosis and treatment of plaintiff, but, notwithstanding said duty, defendant so negligently conducted himself in that regard that as a proximate consequence thereof plaintiff was unskillfully diagnosed or treated, and as a proximate consequence thereof suffered the injuries complained of in the first count.”

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The following charges were given at the instance of the plaintiff."

"(1) If a physician or surgeon has taken charge of a patient, and undertaken for reward to furnish hospital and apparatus for the operation, it is his duty to exercise proper care and diligence to furnish reasonably prudent and proper facilities, and he may be liable for any failure so to do, even though he is otherwise careful and competent.

"(2) No matter how skillful or careful a physician or surgeon may be, he has no right to perform a dangerous operation upon an adult person of sound mind without his consent, even if the patient has consented to another and different operation."

"(4) Consent to the performance of one kind of operation would not be consent to the performance of another and different operation."

"(6) No matter how skillful a physician or surgeon may be, he is responsible for his negligence, if any."

The following charges were refused to the defendant:

"(4) The court charges the jury that there can be no recovery in this case for any negligence on the part of the defendant that falls short of gross negligence.

"(5) The court charges the jury that, unless they are reasonably satisfied from the evidence in this case that the defendant was guilty of gross negligence in his treatment of or his efforts to cure the disease of plaintiff, or in his diagnosis of the disease of the plaintiff, there can be no recovery."

"(9) The court charges the jury that a physician or surgeon is bound to give his patient the benefit of his best judgment, but is not liable for a mere error of judgment."

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“(21) The court charges the jury that there can be no recovery in this case for the injuries sustained by the plaintiff by reason of the disease with which he was afflicted.”

“(29) While the responsibility of the medical practitioner and surgeon is great, and care appropriate should be observed, in the exercise of his professional employment, when his errors are of judgment only, if he keeps within recognized and approved methods, he is not liable for their consequences.”

“(32) The court charges the jury that the burden of proof is upon the plaintiff in this case to show that there was a want of care, skill, and diligence, and also the burden is on the plaintiff to show that the injury complained of was a proximate result of such want of care, skill and diligence.”

“(42) The court charges the jury that a physician or surgeon incurs no liability where the natural temperament or physical weakness of the patient, of which he is ignorant, contributes to bring about an injury which could not be foreseen as a result of the course of treatment.

“(43) The court charges the jury that, if they find from the evidence in this case that the injuries complained of were a proximate result of the plaintiff’s physical inability to stand the operation, then I charge you that the verdict should be for the defendant.”

“(45) The court charges the jury that if they find from the evidence in this case that the defendant did undertake to perform the operation in question, or to cause the same to be performed, and further find that in carrying out the undertaking he procured the services of Dr. E. M. Robinson, and you further find that Dr. E. M. Robinson was at the time doing an independent business as a physician, not connected with the

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defendant, and that he was a regularly licensed and practicing physician and surgeon under the laws of this state, and you should further find that the injuries complained of were the result of some act of omission of the said Dr. E. M. Robinson, then you should find for the defendant."

"(51) The court charges the jury that a surgeon has the legal right to advise such an operation as in his judgment the exigencies of the case demand, and if the patient consents to such an operation the surgeon has the legal right to proceed with such operation, and cannot be held liable for the proper performance of such operation."

"(56) The court charges the jury that the burden is on the plaintiff to reasonably satisfy you from the evidence in this case that he did not give his consent for the very operation in question, and also to reasonably satisfy you from the evidence that he was incapacitated to consent to the operation."

"(59) The court charges the jury that, if a physician is called to treat a patient, it matters not with what disease he is suffering, or the nature of the treatment needed, the physician may treat such patient with such treatment to the best of his ability, and he cannot be held liable for undertaking such treatment and doing it as best he can."

"(44) The court instructs the jury that they are necessarily bound, independent of every other consideration, to adopt the testimony of the physicians and surgeons who have testified in this case, and the text-books introduced in evidence, when they come to determine whether, on the facts in this case, this defendant has treated the case in question in the proper form and by the use of proper appliances."

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“(57) I charge you, gentlemen of the jury, that if you find from the evidence in this case that the plaintiff was carried to the hospital for a slight operation and that after he was there the operation performed on him was agreed on between plaintiff and the doctors, then I charge you that there can be no recovery in this case for the proper performance of said operation.”

“(38) The court charges the jury that if, after considering all the evidence in this case, they find that their minds are in an unsettled state as to whether the defendant is liable or not, then your verdict should be for the defendant.”

JAMES TROTTER, and ESTES, JONES & WELCH, for appellant. The demurrers should have been sustained to the 3rd and 5th counts, as under the facts stated the liability if any existed, rested on the surgeon operating, who acted in an independent capacity.—55 Am. St. Rep. 606; 26 Cyc. 1546-49; 16 A. & E. Enc. of Law, 187; 136 N. Y. 1. On the whole case the affirmative charge should have been given for defendant.—*Hendrick v. Shipp*, 52 South. 932. Dr. Caldwell had qualified as an expert and his testimony should have been admitted.—*Parrish v. The State*, 36 South. 1012. Charge 6 given at the request of plaintiff was erroneous.—30 Cyc. 1575. Charge 9 should have been given for defendant, as should charges 21 and 29.—3 Wharton & Stiles Med. Jur. sec. 501; 37 L. A. A. 834; 30 Cyc. 1578; 22 A. & E. Enc. of Law, 804-811. Charges 38 and 39 should have been given.—2 Mayf. 570. On the same authorities the other charges requested by defendant should have been given.

GEORGE B. ROSS, and BOWMAN, HARSH & BEDDOW, for appellee. Counsel discuss the points made by appellant

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and criticise authorities cited by them, but cite no other authority.

SAYRE, J.—For some years plaintiff had been treated by the defendant and other medical men for tic douloureux, an exceedingly painful disease of the nerve which supplies the face with sensation. In keeping with the general, if not universal experience, medicaments had been of no avail. Defendant, who kept a hospital, advised an operation, and, after consulting with plaintiff, procured his brother, who made a specialty of surgical cases, to perform the operation for a compensation agreed upon, and to be paid by the plaintiff. Doctor E. M. Robinson, defendant's brother, was not interested in the hospital, nor had any business connection with the defendant. The operation was not successful in relieving the suffering caused by plaintiff's specific disease, and, besides, left him with some disfigurement, and without the protection afforded the brain by the hard plate of his skull over an area of $2\frac{1}{2}$ by $1\frac{1}{2}$ inches. Afterwards plaintiff brought this suit for malpractice, and recovered a verdict and judgment for a good round sum. Defendant appeals.

Counts 1 and 2 were eliminated by judgment on demurrer. The remaining counts, upon which the case went to the jury, proceeded upon two theories: (1) That defendant performed, or caused to be performed, upon plaintiff a serious operation, without his consent; (2) that defendant unskillfully or negligently diagnosed or treated plaintiff's ailment. Defendant's alleged default in each case is averred to have caused grave injury to plaintiff in particulars which are set out. We do not find that the demurrsers pointed out any defect in the complaint on which the case was tried.

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Many assignments of error are based upon the giving and refusal of instructions and some upon rulings on questions of evidence. These assignments have been examined *seriatim*, and we are not ready to affirm error of any of them. So far as the exceptions relating to questions of evidence are concerned, the rulings in the trial court are to be justified on grounds which are familiar, and we do not feel that any good is to be accomplished by noticing them at length.

As for the charges, those given at the instance of the plaintiff assert principles of law which seem entirely plain. The appellant criticises those numbered 1, 2, and 4 as stating propositions of law pertinent to hypotheses of fact which had no support in the evidence. We think it will appear from a discussion of the evidence, to which we will come later on, that there was at least a scintilla of evidence to support the plaintiff's case in at least one of its general aspects, as well as those particular features presented by these charges. Even though the facts were otherwise, the charges would be abstract merely, in which case errors could not be predicated of their giving, unless it appeared from the whole record they did in fact mislead the jury to the appellant's prejudice.

Of charge 6 appellant complains, because it holds a physician or surgeon responsible for his negligence; whereas he is responsible only for the proximate result of such negligence. But appellant's argument mistakes the purpose and effect of the charge. It does not deal with the question of the necessary intimacy of the connection between recoverable damages and the cause out of which they arise. It does no more than state the sound general proposition that no degree of skill on the part of a physician or surgeon, no knowledge of his profession or power to perform its duties, will relieve

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him of responsibility for the consequences of a negligent and tortious failure to exercise that skill in behalf of his patient.

Charges 4 and 5, refused to the defendant, maintain the proposition that a physician and surgeon is responsible civilly for gross negligence only. Such is the measure of his responsibility in criminal prosecutions, but a civil action may be sustained on proof of a failure to exercise such reasonable care and skill in respect to the duty assumed as physicians and surgeons in the same general neighborhood, in the same general line of practice, ordinarily have and exercise in like cases.—*McDonald v. Harris*, 131 Ala. 359, 31 South. 548; *Shelton v. Hacelip*, 167 Ala. 217, 51 South. 937; *Hamrick v. Shipp*, 169 Ala. 171, 52 South 932; *Carpenter v. Walker*, 170 Ala. 659, 54 South. 61.

Charge 9 exempts medical men from liability for mere errors of judgment, provided they give the patient the benefit of their best judgment. The charge is defective, in that it requires of medical men no skill whatever. There is in it no requirement that the judgment brought by the professional man to the discharge of his duties shall be informed and educated according to the standard of the time and general locality, as the law requires.—2 Jaggard on Torts, 912; cases, supra. The charge in the shape proposed by the defendant was incomplete, misleading, and in consequence properly refused.

Charge 21 was misleading and refused without error. There was no pretense that defendant had by malpractice induced plaintiff's disease. But without the disease plaintiff would not, it may be assumed, have suffered the injurious consequences of an operation performed, as he alleges, without his consent, or without the exercise of due care and skill, so that, in a sense,

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plaintiff suffered these consequences by reason of his disease. The disease was the occasional cause of the injury complained of, while, on plaintiff's theory of his case, defendant's malpractice was its efficient cause. If the alleged efficient cause existed, as alleged, plaintiff was entitled to recover. Defendant could not require the court to give in charge to the jury a statement of the law involving such discriminations, unless with a clear statement of them. The only effect of the charge would have been to obscure the issue and confuse the jury.

The considerations upon which we have ruled that the court properly refused to give charge 9 will suffice to justify the court in refusing charges 29, 51, and 59. It may be further said of charge 29 that, while appellant no doubt had in mind the methods of skilled and careful medical men, as furnishing a proper standard by which to judge defendant's treatment of plaintiff's disease, the charge is not so written.

The refusal of charges 31 and 56 may be justified on the ground that they were capable of a construction which would fix upon the plaintiff the burden of proving one certain aspect of his case as a condition to recovery; whereas, in both pleading and evidence, plaintiff was proceeding at the same time upon another and entirely different alternative theory, proof of which would have entitled him to verdict and judgment without reference to that aspect of the case with which the charge attempted to deal.

Charges 42 and 43, when read in connection with the pleading and testimony, have a common fault. If plaintiff had a temperamental or physical weakness which could not be foreseen, and which contributed to the failure of the operation, defendant would be nevertheless liable, if he contributed to plaintiff's injury by

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a failure to exercise due care and skill, or by performing upon plaintiff a serious operation without his consent, express or implied. We do not, of course, intend to say that there may not arise grave emergencies in which a surgeon may operate upon his patient without his knowledge and consent. Clearly this was not a case of that character.

Forty-five was properly refused, because it directed a verdict for the defendant on one aspect of the case, ignoring plaintiff's contention, which had support on the face of the evidence, that the defendant caused a serious and unsuccessful operation to be performed upon plaintiff, after assuring the latter that the operation would be superficial in extent and unattended by serious risk.

A number of the questions which arose during the progress of the trial were of such character, were so far apart from the field of general knowledge, and so peculiarly within the scope of professional learning and experience, that the testimony of the expert witnesses was entitled to great consideration by the jury. Still the jury could not be required, as matter of law, to accept the conclusions of such witnesses. They were to determine for themselves, theoretically at least, the weight to be accorded to the expert testimony, and to base their verdict upon their own judgment of the facts.—*McAllister v. State*, 17 Ala. 434, 52 Am. Dec. 180; *Andrews v. Fricson*, 144 Ala. 470, 39 South. 512. Charge 44 was properly refused to the defendant.

Charge 57 assumes that the operation was properly performed, and was well refused for that reason.

By charge 38, the defendant sought to have the jury instructed that if, after consideration of all the evidence, their minds remained in an unsettled state in respect to the question whether the plaintiff was entitled to

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recover, their verdict should be for the defendant. It has been frequently decided that the plaintiff carries the burden of proving his case to the reasonable satisfaction of the jury, and that a charge which omits the word "reasonable" in connection with "satisfaction" is erroneous.—*L. & N. R. R. Co. v. Sullivan Timber Co.*, 126 Ala. 95, 27 South. 760. In stating this burden of proof to the jury, there was no occasion for the use of an untried term, which may have produced upon the minds of the jury an unwarranted impression in respect to the weight of the burden placed by law upon the plaintiff. "Settle" is a strong word. It implies that the mental state to which it is applied has become fixed, permanent, and not subject to change. The charge here adopted by the defendant was a doubtful equivalent for that statement of the law on the subject which is familiar to the profession in this state, and we are not disposed to affirm error of its refusal.

An examination of the record discloses such conflict in the evidence on all points as to preclude the affirmative charge upon the whole case. Charges, other than those which have been discussed, amounted to directions to the jury on the theory that plaintiff had introduced no evidence whatever to sustain his case. Under the rule prevailing in this state in respect to the functions of court and jury in the determination of disputed issues of fact, these charges were properly refused, and this, notwithstanding our opinion that upon the whole evidence plaintiff's case was so thoroughly uprooted and overturned that the verdict of the jury should not have been allowed to stand against defendant's motion to set it aside, as against the great weight of the evidence.

In one aspect of his case, plaintiff claimed that defendant caused a dangerous operation to be performed upon him, after assuring him that the operation to be

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performed would be a mere trifle, as operations go, and would involve no serious consequences. As has been stated, the operation not only failed to relieve plaintiff's ailment, but left behind injurious consequences of its own. If plaintiff's contention in this regard be true, and it had support in his testimony, defendant's conduct would seem to be indefensible. The cases so hold. —*Mohr v. Williams*, 95 Minn. 261, 104 N. W. 12, 1 L. R. A. (N. S.) 439, 111 Am. St. Rep. 462, 5 Ann. Cas. 303, and note. But a careful consideration of the evidence leaves us with an abiding conviction that the verdict, if rendered on this aspect of the case, ought not to be permitted to stand. Defendant was a reputable physician. He had attended the plaintiff at intervals since the latter's childhood, and through many months he had treated him for the specific disease of which it was proposed to relieve him by the operation in question. He had the plaintiff's confidence. The operation was performed in the presence of three other physicians, nurses, and three brothers of the plaintiff. It was dangerous, difficult, and of doubtful result at best. The defendant and two of the other physicians swear that the plaintiff was specifically informed of the nature of the operation which it was proposed to perform. The fourth was not examined on this point, and we assume that he knew nothing of the preliminary conferences with the patient. It is an undisputed circumstance of great and peculiar weight in this case that nearly a year elapsed after the operation before plaintiff, or any one for him, intimated that he had a grievance by bringing this suit or otherwise, and that in the meantime plaintiff, without a word of complaint or reproach for the great wrong which he now says had been done him, returned to defendant for treatment, and consulted with him about having the operation repeated. Perhaps nothing short

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of a repetition of all of it could make clear how great was the weight of the testimony against the plaintiff's contention. The wrong attributed to the defendant was so utterly without motive, so wide a departure from the principles and practices of an honorable profession, the complaint so long delayed, and the general lack of verisimilitude so great, that, without going further into detail, and after indulging that large intendment in favor of the verdict of the jury and the judgment of the trial court which the law demands of this court on appeal, we state our conclusion that, if the verdict in this case is to be referred to that theory of the plaintiff's case now under consideration, it ought to have been set aside on the defendant's motion. It is true that plaintiff did not insist upon this theory of his case without qualification, for he testified, as an alternative, that if he was informed of the character of the operation he was so informed after his faculties had been so benumbed by an opiate, administered by the defendant, that he could not and did not understand or consent. But on this point the evidence was equally as clear, and the considerations referred to make this alternative as unworthy of belief as the other.

But appellee complained in the court below that the defendant had unskillfully or negligently diagnosed or treated his case. Of error in diagnosis there is not a particle of evidence. As for any unskillfulness or negligence which may have characterized the operation and affected its results, assuming, for the argument, that the jury were authorized to find there was such, that operation was not performed by defendant, but by another surgeon, under circumstances which have been stated. That this other surgeon did perform the operation, proceeding upon his own judgment as to what ought to be done and how, is without dispute. The

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defendant took part to the extent only of administering the anaesthetic, and advising that the effort to complete the operation be abandoned on account of the patient's ebbing vitality. There is no suggestion that in these things he showed any lack of skill or committed any error. Nor is there any suggestion in pleading or in proof that defendant negligently advised the employment of an unskillful or incompetent surgeon to perform the operation. Under these circumstances, the defendant was not responsible for any default on the part of the operating surgeon, who was practicing his profession as an independent agent.—*Myers v. Holborn*, 58 N. J. Law, 193, 33 Atl. 389, 30 L. R. A. 345, 55 Am. St. Rep. 606. But it is argued, as we read the brief, that defendant contributed to the result of the operating surgeon's alleged negligence by furnishing an inadequately equipped place in which to perform the operation. This, however, leaves the question at issue to depend upon defendant's responsibility for the operating surgeon; for, if the condition of the hospital and its equipment was such as, in itself, to import an element of negligence or unskillfulness into an operation performed there, the responsibility rested upon the surgeon, whose judgment determined upon and directed the operation. Moreover, the medical men who testified in the case including Dr. Waldrop, upon whose testimony plaintiff's case at last depended, and who had performed operations there, gave their approval to the hospital.

There seems to have been an effort to fasten responsibility upon defendant for some unskillfulness or neglect of Dr. Caldwell. Dr. Caldwell was associated in business with the defendant, and it was open to the jury to find that at a time prior to the operation he had given the plaintiff some unskillful advice about his case, and

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the extent and character of the operation which might be expected to effect a cure. But that was one reason why the defendant, Caldwell, and the operating surgeon were careful afterwards to inform plaintiff of the true nature of the operation. Dr. Caldwell was also present at the operation, and lent some assistance; but there is an entire absence of evidence to show that his advice was followed in any particular, or that he was guilty of any negligence in doing what it fell to him to do.

On consideration of the whole case presented by the record, which contains all the evidence, we conclude that the jury were more moved by sympathy for plaintiff, who had undergone an unsuccessful operation, than by a consideration of the law and the facts upon which the results should have been made to turn. There is no rule of responsibility which requires of the physician or surgeon infallibility in the diagnosis or treatment of disease.—*Hamrick v. Shipp*, 169 Ala. 171, 52 South. 932. In the exercise of its supervisory power over the findings of a jury, the court should proceed with great caution; but it should leave no evident mistake unrighted. The trial judge in this case deferred too much to the jury's finding. The judgment should have been set aside on the defendant's motion.

Reversed and remanded. All the Justices concur, except DOWDELL, C. J., not sitting.

[Cooper, et al. v. Slaughter.]

Cooper, et al. v. Slaughter.

Trespass and Trover.

(Decided January 18, 1912. 57 South. 477.)

1. *Principal and Agent; Trespass; Complaint.*—The rule being that what one does by another he does by himself, allegations that defendant committed trespass through their servants, agents or employees, are sufficient under counts claiming for the common law trespass, or the statutory penalty for cutting trees.

2. *Pleading; Demurrer; Sufficiency.*—Where a demurrer is interposed on the ground that certain counts did not allege any facts to show defendant's liability for any trespass by K or A, the demurrer is general and cannot be considered.

3. *Trial; Reception of Evidence; Conditional Objection.*—Where a party objected to evidence unless other facts are shown, this is a conditional objection and will not support error.

4. *Same; Discretion of Court.*—The acceptance or rejection of evidence not strictly in rebuttal is within the sound discretion of the trial court.

5. *Same; Statement of Ground.*—The statement of one or more grounds of objection to evidence is a waiver of all other grounds not stated.

6. *Witnesses; Examination; Leading Questions.*—Whether or not a court will permit leading questions to a witness is within the sound discretion of the trial court.

7. *Boundaries; Agreement; Mutuality.*—Where plaintiff testified to the authority of her agent, and that she had ratified the agreement, such testimony established the agreement as binding on her, and the mutual promises constituting a valuable consideration, it was proper to admit in evidence an agreement between adjoining landowners, signed by defendant and by S as agent for plaintiff, by which the parties agreed that each should employ a surveyor who should jointly locate the boundary line, and that they should abide by the line so established, over the objection by defendant that it is not shown to be binding on plaintiff and that it was without consideration.

8. *Same; Necessity of Writing.*—The common law submission to arbitration of a disputed boundary line need not be in writing and may be made in writing by an agent, having only verbal authority.

9. *Same; Evidence.*—In an action involving a disputed boundary it was not error to permit a party to show an instance in which her agent objected to the presence on the disputed strip of a party who had purchased from the opposite party, as it bore on the question of possession and control.

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10. *Same; Maps.*—It was competent to introduce in evidence maps made jointly by two surveyors selected by the parties to determine the true boundary line, since apparently, the agreement was binding, and based on mutual promises.

11. *Same; Agreement.*—Where the action involved a disputed boundary line and there was evidence of an agreement apparently binding on both parties to appoint surveyors and abide by their decision, it was not error to charge that if the jury believe that defendant made an agreement with plaintiff to have the line ascertained by a survey, the jury might consider the agreement in connection with the other evidence in the case to determine whether or not defendant's possession of the disputed strip had been adverse.

12. *Same; Instructions.*—A charge asserting that if the jury believed that a boundary line was in dispute, and that the adjoining owners caused it to be established and acquiesced in the line as established, plaintiff would be deemed the owner of all lands up to such line, was correct, since the word "deemed" is equivalent to the word "presumed" and the word "acquiesce" not necessarily meaning only momentary acquiescence.

13. *Evidence; Opinion.*—Possession being a fact to which a witness may testify it is proper to ask a witness as to who was in actual possession of certain lands.

14. *Same; Declaration as to Boundary.*—In an action of trespass involving the location of a boundary line, cross examination of a defendant as to acts and declarations of a co-defendant concerning the location of the boundary, and cross examination of defendant's witnesses relative to the same matter, was proper as bearing on the character of the co-defendant's possession.

15. *Adverse Possession; Character; Evidence.*—The submission to arbitration of a disputed strip, although no certificate of award has ever been made, when executed by an actual survey, is also competent as bearing on the location of the true boundary.

16. *Same; Disputed Boundary.*—Where two adjoining landowners claim to a certain line, believing it to be the true boundary line, and intending to claim only to the true line, and it afterwards developed that the line to which they claimed is not the true line, their holding cannot be said to be adverse.

17. *Same; Actual Possession; Instruction.*—Where the action was for trespass involving a disputed boundary line, and defendant by plea set up adverse possession and ownership, and it was admitted by the parties in open court that defendants were the owners of section 45, and that plaintiff was the owner of section 46, a charge asserting that if the disputed strip was in section 46, the jury could not find defendant to have been in adverse possession unless such possession was actual, was proper, since the plea of ownership to section 46 was refuted by the admission of defendant's ownership of section 45, and it was incumbent on defendants to prove their plea of adverse possession.

18. *Appal and Error; Harmless Error; Evidence.*—Overruling a valid objection to a question not answered by a witness or answered favorably to the party objecting, is not prejudicial error.

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19. *Same.*—Where there was an apparently binding agreement in evidence and one of the surveyors had already testified a map made or purporting to have been made by two surveyors chosen under said agreement was properly admitted over the objection that it was not made under an agreement binding on the party objecting, although it added nothing to the testimony of the surveyor.

20. *Same; Harmless Error; Instruction.*—Where the parties by admission in open court limited the issues to the question of title, a charge relating only to the question of possession was harmless, if erroneous, especially where the jury, by their verdict disregarded the common law action.

21. *Same.*—Where the party complaining of the obstruction did not ask an explanatory charge, it is not error to reversal to give a charge which is not erroneous if construed in a certain way, although it might be erroneous if construed in another way.

22. *Same; Review.*—Objections not taken in the court below can not be considered on appeal.

APPEAL from Washington Circuit Court.

Heard before Hon. SAMUEL B. BROWNE.

Action by Mrs. Mary E. Slaughter against J. M. Cooper and another in trespass and for the statutory penalty for cutting trees. Judgment for plaintiff, and defendants appeal. Affirmed.

The pleadings are sufficiently noted in the opinion. The following are the assignments of error referred to in the opinion: (5) In overruling defendants' objection to the following question, put to the witness Mary E. Slaughter, in the management of certain lands in this county. (6) "Did you send Mrs. Slaughter here to Mobile, * * * and to take what steps as was necessary to adjust that dispute?" (7) To Bill King: "Did you ever cut any pine trees?" (8) To the same witness: "As a matter of fact, did not Mr. Slaughter tell you that the line was a great way up?" (9) Set out in opinion. (10) The map. (12) Question to E. M. Slaughter: "Did you ever take any steps to keep trespassers off this disputed zone?" (15) To witness Pelham: "You are the owner of some adjacent land south of section 45, land that adjoins section 45 on the

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south?" (16) To the witness Coates: "Did you ever hear of Capt. Cooper claiming some land on the south end of section 45, in the town of St. Stephens?" (18) To Mrs. Cooper: "Have you ever claimed that the south boundary line of section 45, as you now claim it, was incorrect?" (19) To the same witness: "Did you, or Capt. Cooper, so far as you know, go to Mobile for the purpose of employing a lawyer to reclaim the property that was given to you on the south part of section 45?" (20) To the witness Turner: "When was that, Mr. Turner; about when?" (21) Same witness: "Did Mrs. Cooper know of your employment?" (22) To the same witness: "Mr Turner, did you ever hear anything of an old line Mr. Cooper claims as having been recognized for a number of years?" (24) Same witness: "Now, don't you remember exactly when it was; that is, to the best of your judgment, how long it has been?" (25) To the witness Williams: "Did Capt. Cooper ever tell you that you must pay him rent for the place on which you are living?"

The following charges were given for the plaintiff: (1) "If the jury believe from the evidence that the defendant J. M. Cooper made an agreement with the plaintiff to have the line dividing the northern portion of section 45 and the southern portion of section 46, township 7, range 1 west, ascertained by a survey, the jury may look to such an agreement, in connection with all the other evidence, in determining whether the possession of the defendants has been adverse or not." (3) "The court charges the jury that if two adjacent land-owners claim up to a certain line, believing it to be the true line, and intending to claim only to the true line, wherever the true line may be, and it afterwards develops that the line to which they claim is not the true line, then their holding is not adverse." (2) "The

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court charges the jury that if they believe from the evidence that the boundary line in question was in dispute, and that the adjoining owners caused said line to be established, and that they acquiesced in said line, then the plaintiff would be deemed to be the owner of all lands north of the line so established, lying in section 46, township 7, range 1 west." (4) "If you believe from the evidence that the strip of land in question is in section 46, township 7, range 1 west, Washington county, Ala., then you cannot find that the defendants, or either of them, was in the adverse possession, unless you are reasonably satisfied from the evidence that such possession was actual." (5) "The court charges the jury that, before you can find for the defendant under pleas numbered 2, 3, and 5, you must be reasonably satisfied from the evidence that the defendants were in possession of all of section 46, township 7, range 1 west, in Washington county, Ala."

FITTS & LEIGH, and GORDON & EDDINGTON, for appellant. The 1st, 2nd, 3rd and 4th assignments of error are sustained by the case of *Williams v. Hendricks*, 115 Ala. 278. The 9th assignment is error.—Wigmore on Evi., sec. 793-4. The 10th assignment of error is well taken.—*Stein v. Ashby*, 24 Ala. 521; *Nolan v. Palmer*, 21 Ala. 66; *Cundiff v. Ormes*, 7 Port. 58; *Avery v. Searcy*, 50 Ala. 54; *Clements v. Pearce*, 63 Ala. 284; *Campbell v. State*, 23 Ala. 44. The witness was improperly allowed to state who was in actual possession of the land.—*Davis v. Arnold*, 143 Ala. 230; *Clither v. Fenner*, 106 Am. St. Rep. 978; *Woodstock Co. v. Roberts*, 89 Ala. 436; *Warren's case*, 91 Ala. 533. There was no question of possession, but one strictly and exclusively of ownership involved, and hence, there was error in admission of evidence as to the course taken

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by plaintiff with respect to others intruding.—*L. & N. v. Hill*, 115 Ala. 334; *Davis v. Arnold*, *supra*. The charge complained of in the 26th assignment is bad.—Section 6035, Code 1907, and annotations; 66 L. R. A. 934. The charge pointed out in the 27th assignment is bad.—Authorities next above and *Gravelee v. Williams*, 112 Ala. 539. The same is true of the charge pointed out by the 28th assignment.—*Green v. The State*, 97 Ala. 60.

TURNER, WILSON & TUCKER, for appellant. Each count of the complaint claiming the statutory penalty is sufficient.—*Turner C. Co. v. Glover*, 101 Ala. 289; *Roger v. Brooks*, 99 Ala. 31. The agreement was properly admitted in evidence.—5 Cyc. 930; 31 Cyc. 1227; *Hess v. Rutter*, 117 Ala. 525; *Richmond L. & M. Wks. v. Moragne*, 119 Ala. 80. The map was properly admitted in connection with the surveyor's evidence.—*Driver v. King*, 40 South. 315; *Burton v. The State*, 115 Ala. 9. A witness may state who is in actual possession of land.—*Steed v. Knowles*, 97 Ala. 573; *Dorlan v. Wescovitch*, 140 Ala. 283. Adverse possession was not established.—*Goodson v. Brothers*, 111 Ala. 589; 1 Cyc. 999, and 1027. Oral agreements between joint owners establishing a boundary line are not prohibited by the statute of frauds.—*Shaw v. The State*, 125 Ala. 80; 5 Cyc. 931. It will be presumed that the agreed line was the true line according to the original location.—5 Cyc. 933.

SOMERVILLE, J.—The complaint is in six counts, of which the first, third, and fifth are framed under the statute to recover the penalty for willfully and knowingly cutting five pine trees, the property of plaintiff on section 46, township 7 N., range 1 W., Washington

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county, Ala. The first count charges the cutting to the defendants; the second charges it to the defendants through their agents, servants, or employees; and the fifth charges that defendants caused one Bill King and one Lev Anderson to do the cutting. The second, fourth, and sixth counts are in common-law trespass, with the same variations noted, respectively, as to the first, third, and fifth counts.

Defendants demurred to the third and fourth counts collectively, and also to the fifth and sixth counts collectively, on the grounds (1) that they "do not allege that said *parties* were acting within the scope of their authority;" and (2) that they "do not allege any facts to show defendants liable for any trespass by Bill King or Lev Anderson." The demurrers were overruled, and in this there was no error. Had the third and fourth counts averred simply that the agents or servants of defendants willfully and knowingly cut the trees, or trespassed on the land, the first ground of the demurrer would doubtless have been well taken. But the averments are that *defendants* did those acts through their agents or servants. This was sufficient; for, "Qui facit per alium, facit per se." For the same reason, this ground of demurrer is still more patiently bad as applied to the fifth and sixth counts. The second ground is general, and could not, for that reason, be considered.

With respect to those assignments of error based on the rulings of the trial court on the evidence, the following principles are settled:

(1) When a party objects to a question, *unless* other facts are shown, this is but a conditional objection, and for overruling it the trial court cannot be put in error.

(2) The permission of leading questions, and the acceptance or rejection of evidence not strictly in rebuttal, are within the sound discretion of the trial court.

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(3) The statement of one or more grounds of objection is a waiver of all other grounds not stated.

(4) Overruling a valid objection to a question not responded to by the witness, or else answered favorably to the objector, is not prejudicial error.

One or another of these principles will condemn the fifth, sixth, seventh, eighth, ninth, tenth, twelfth, fifteenth, sixteenth, eighteenth, nineteenth, twentieth, twenty-first, twenty-second, twenty-fourth and twenty-fifth assignments of error.

The ninth assignment relates to the admission in evidence of a written agreement, purporting to be between J. M. Cooper, one of the defendants, and E. M. Slaughter, "as agent for Mrs. M. E. Slaughter," the plaintiff, and purporting to be signed by "J. M. Cooper" and "E. M. Slaughter, Agent." The substance of the agreement was that, to settle an existing dispute between them as to the boundary between sections 45 and 46, and to establish a correct line, each party should employ a surveyor who should jointly locate said line, and that they should abide by the line thus established, and that all disputes as to former lines should be thereby settled. The objections to its introduction were, in substance, that it was not shown to be binding on the plaintiff; and hence was not binding on the defendants, and was without any expressed considerations. The answer to these objections is (1) that the plaintiff had already testified to the full authority of her agent, E. M. Slaughter, to represent her in the adjustment of the dispute, and that she had ratified this agreement; and (2) the mutual promise to abide by the result was a sufficient consideration for the agreement.

The agreement was evidently designed as a common-law submission for arbitration and award; and, the issue being merely a disputed boundary, no writing was

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necessary.—*Shaw v. State*, 125 Ala. 80, 28 South. 390. Hence, though the agreement was in fact in writing, it could be made, on behalf of the principals, by their authorized agents without any written authority. Had this agreement been fully executed by the *certification* by the arbitrators of the line established by them, it seems that this would have been conclusive of the whole dispute, and would have settled the issues of this case in favor of the plaintiff, operating by way of estoppel against the defendant's contentions.—*Shaw v. State*, 125 Ala. 80, 28 South. 390; *Moore v. Helms*, 74 Ala. 368; *Burrus v. Meadors*, 90 Ala. 140, 7 South. 469. A copy of a paper, purporting to be the certificate of the arbitrators as to the line established by them, is incorporated in the transcript, and marked "Exhibit C." But it nowhere appears that the certificate was introduced in evidence; and hence we cannot consider it here for any purpose. Nevertheless the agreement was in any case competent as an admission by Cooper to show the character of Cooper's claim to the disputed strip, and whether his asserted possession was or had been with the intention of claiming it absolutely, regardless of the true boundary, or only in case it lay within his true boundary, and was a part of his section 45. For this was one of the decisive issues in the case as framed by the pleadings. It was also, when executed by an actual survey and location, as was the case here, competent to show the location of the true boundary, and might be strongly persuasive, if not conclusive, upon the issue. And we may add, as long as it was acquiesced in, it would be presumed to be the true boundary.

It is now argued that the paper in question was not identified by any witness. This objection, if valid, was not made in the court below, and cannot be here considered.

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The tenth assignment relates to a map of section 45 and its environments, purporting to be made by the two surveyors chosen to establish the disputed line. It may, perhaps, be conceded that this map threw no light on the issues before the jury, or at least added nothing of value to the testimony of Nichol, one of the surveyors. If so, its admission was harmless to the defendants. However, the only objection made to its introduction was that "it was made under an agreement which is not binding on the defendant." The objection was not good, in view of the fact that an apparently binding agreement was actually in evidence; and other grounds of objection, if any there were, were waived.

Possession is a collective fact to which a witness may testify; hence there was no error in overruling defendants' objection to the question to E. M. Slaughter, "Who was in actual possession of section 46," etc?—*Woodstock v. Roberts*, 87 Ala. 436, 6 South. 349; *Carl v. State*, 125 Ala. 89, 28 South. 509. Moreover, the witness had already stated that the plaintiff was in possession, and this question was only cumulative.

Plaintiff was allowed to show a particular instance in which her agent objected to the presence on the disputed strip of an alleged trespasser who had purchased from Cooper, followed by an agreement permitting him to remain. Defendants' general objection to the question was overruled. As an act of possession and control, the facts stated were relevant and competent under the issues as framed. Defendants' motion to exclude the evidence, on the ground that plaintiff had not made out a *prima facie* case, was properly overruled.

The acts and declarations of J. M. Cooper, one of the defendants, with respect to the boundary between sections 45 and 46 and its proper location, were clearly

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relevant, as bearing upon the character of his possession of the disputed strip, and the intent with which it was held by him. Hence plaintiff was properly allowed, on cross-examination, to ask Cooper's wife, his co-defendant, if Cooper had hired a surveyor "to run out his holdings." And also to ask defendants' witness Turner, who had surveyed section 45 at the instance of J. M. Cooper, as to the latter's statements made and instructions given to him at the time in regard to the running of the lines. These considerations dispose of the eleventh, thirteenth, fourteenth, seventeenth, and twenty-third assignments.

Besides the general issue, the defendants pleaded specifically (2) "that they are the owners of the property described in the complaint;" (3) "that they have been in open, notorious, peaceable, adverse, and hostile possession of said property for a period of over ten years; (4) "that there has been no timber cut, as described in said complaint, beyond a boundary line acquiesced in by plaintiff and defendants as the true dividing line for a period of many years;" (5) "that they have been in adverse possession of the property described in the complaint, under color of title, for a period of over 10 years." The bill of exceptions contains this recital: "It is admitted in open court that, for the purpose of this trial, the plaintiff admits that the defendant is the owner of section 45, township 7, range 1 W.; and the defendant admits that the plaintiff is the owner of section 46, township 7, range 1 W.; that section 46 lies north of section 45; that the land in dispute, or the line in dispute, is the line dividing and is the south boundary line of 46 and north boundary of 45; the plaintiff contending that the timber in controversy was cut on 46, and the defendant contending that it was cut on 45."

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This admission being conclusive as to the facts recited, the only remaining issue for the jury to determine, under counts 1, 3, and 5 for statutory damages, was whether the trees in question were willfully and knowingly cut north of the line that properly divides sections 45 and 46. If cut to the north plaintiff was entitled to recover, and if cut to the south the defendants were entitled to a verdict, on the undisputed evidence. It is conceded by appellants that the verdict of the jury was for statutory damages only, and not for common-law trespass. Indeed, the fact is sufficiently evident, since the verdict was for \$50.00 (for five trees, at \$10 each), and only \$10 was claimed for the trespass.

Exception is taken to the giving of five written charges at the instance of plaintiff, which, for convenience, we number consecutively.

Charge 1 asserts a correct proposition of law, and giving it was not erroneous on any theory of the case.—*Walker v. Wyman*, 157 Ala. 478, 47 South. 1011, and cases cited.

Charge 2 asserts a correct proposition of law; for, if a disputed boundary be established by the agreement of the parties, in which they acquiesce, then each is presumed *prima facie* to own up to the line of his side. “Deemed,” as used in this charge, is clearly the equivalent of “presumed”; nor does “acquiesce” mean necessarily *only for a moment*. If these terms had any tendency to mislead in these respects, an explanatory charge should have been requested. Moreover, the charge limits the presumption of ownership to land lying in section 46—a fact conclusively admitted by the admission recited above.

Charge 3 asserts a correct proposition of law; there being no evidence that defendants had any color of title to any part of section 46.

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Charge 4 is not erroneous, for the following reasons: (1) The plea of ownership set up in plea to the whole of section 46 described in the complaint is conclusively refuted by the admission referred to above. (2) If this admission leaves any vitality in pleas 3 and 5, and we think it does not as to the statutory counts, it was nevertheless incumbent upon defendants to prove the pleas as framed, and this, on the undisputed evidence, they did not even pretend to do.

Charge 5, whether right or wrong, as it related only to possession, cannot furnish a predicate for reversible error; for that issue was, by the formal admission of defendants, eliminated from consideration under the statutory counts, and by the verdict of the jury the trespass counts were disregarded. However, we think the charge is a correct statement of the law if by "disputed possession" is meant—as may well be the case—a visibly contested possession. And, although the words *may* mean only a *verbally* disputed possession, such a meaning will not be imputed for the purpose of putting the trial court in error. Defendants should have asked for an explanatory charge, if they feared the misleading tendency of the language used.

We find no prejudicial error in the record, and the judgment is affirmed.

Affirmed. All the Justices concur, except DOWDELL, C. J., not sitting.

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Killian v. Killian, et al.*Damages for Diverting Water.*

(Decided February 8, 1912. 57 South. 825.)

1. *Waters and Water Courses; Diversion; Surface Water; Evidence.*—The evidence stated and held insufficient to sustain counts charging wrongful diversion of a stream from its natural course, causing it to flow over and across plaintiff's land, or that the flow of surface water has been changed.

2. *Same; Injury to Servient Tenement.*—The evidence examined and held insufficient to sustain a count charging injury to a spring and water, and to plaintiff's farm.

3. *Same; Pollution.*—A landholder may not place anything in either percolating water or that which is gathered in defined and known surface streams which will pollute the wells or springs of his neighbor.

4. *Same; Drainage.*—An upper landowner may drain and ditch his land provided he does so with a prudent regard for the welfare of lower owners, and that he does no more than concentrate the water and cause it to flow more rapidly and in greater volume on the inferior heritage, and it is usually a question for the jury whether the use made was reasonable.

5. *Same.*—In an action for deflecting water into a sinkhole whence it flowed by underground channels into plaintiff's spring, it was a question for the jury whether the disposition of the water by the defendant was a prudent and proper one to protect his own property, and whether it was with a proper regard to the interest of plaintiff, a lower owner.

6. *Same; Natural Channel; What Constitutes.*—The fact that water flows naturally through a channel will not make it a known and well defined channel.

7. *Same; Pollution; Acts of Dominant Owners.*—To render an upper owner liable to the lower owner for pollution of a spring by diverting waters into a sinkhole, it must be shown that the water falling into the hole passed through the spring, and that the water would not pass into the sinkhole but for the acts of such upper owner.

8. *Same; Burden of Proof.*—The burden of showing that the spring was damaged by the act or agency of the upper owner is upon the lower owner suing for such pollution.

9. *Same; Action; Parties.*—Where the defendant neither owned any interest in the land on which the sink hole was located, in which the waters were claimed to have been diverted, nor directed nor authorized the act in question, no recovery can be had against him for diverting surface water and polluting a spring.

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10. *Same; Instructions.*—Whether or not the defendant, an upper owner, knew that the water diverted would flow into plaintiff's spring was for the jury in determining whether the disposition of the water was prudent and with due regard to the interest of the plaintiff, and an instruction asserting that a lack of knowledge would not relieve the defendant from liability was misleading.

11. *Same.*—Where the action was for deflection of surface water into a sink hole, causing injury to plaintiff's spring, an instruction asserting that in law a known and well-defined channel is a channel through which water naturally flows, was abstract.

12. *Damages; Pollution; Damages Recoverable.*—Damages to a spring caused by the diversion of surface water into a sinkhole are such damages as have accrued prior to the bringing of the action; damages accruing since the commencement of the action are not recoverable.

APPEAL from DeKalb Circuit Court.

Heard before Hon. W. W. HARALSON.

Action by W. E. Killian against G. W. Killian and another. Judgment for defendants, and plaintiff appeals. Affirmed.

The facts sufficiently appear from the opinion of the court. The following is the oral charge of the court excepted to: "If Kenneth Killian, by building a rock wall or doing any other act, caused more water to flow into the hole than otherwise would have done so, and he knew, or had knowledge to lead him to believe, at the time, that the water would go into an underground channel leading to plaintiff's spring, and that it would flow into plaintiff's spring and injure it, and did so injure it, then the defendant Kenneth Killian would be liable; otherwise not."

The following charges were refused to the plaintiff: (1) "The court charges the jury that in law a known and well-defined channel is a channel through which water naturally flows." (2) "The court charges the jury that the fact, if it be a fact, that defendant Kenneth Killian did not know that the water, diverted from the natural channel and caused to run into the sink hole, flowed or would flow into plaintiff's spring, does

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not relieve him from liability, if the water was thus diverted to an underground channel which connected with plaintiff's spring." (3) "The court charges the jury that if defendant Kenneth Killian, by constructing a stone wall or other means, diverted a stream from its natural channel, or a part of a stream, and this water flowed through an underground channel and into plaintiff's spring, and that if this caused injury and damage to the spring, then the plaintiff is entitled to a verdict for such damages as the evidence may show he is entitled to." (4) "If you are satisfied from the evidence that the defendant knowingly diverted the water from his land into a subterranean stream forming plaintiff's spring, and that said spring was thereby damaged or impaired, the defendant would be liable in such damages in such sum as you may determine the evidence warrants, not exceeding the sum claimed in the complaint."

The following charges were given for the defendants: (1) "The court charges the jury that, before they can find for the plaintiff, they must believe from the evidence that the water which flows into the sink hole passes through Killian's spring, and that the water would not have passed into the sink hole, had it not been for the work done on said sink hole by the defendants, or because of the rock wall or levee constructed by defendants." (2) "The court charges the jury that, if they believe the evidence in this case, they cannot find for the plaintiff under count 2 of the complaint." (3) "The court charges the jury that, if they believe from the evidence that at the time of the building of the wall, or the removal of the stone or other substance from the sink hole, G. W. Killian owned no interest in the lands on which they were situated, and did not direct or authorize said act, you cannot find for the plaintiff as against said G. W. Killian." (4) "The court charges

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the jury that the plaintiff cannot recover damages to his farm or spring which have accrued since the suit was commenced." (5) "The law holds a man liable for the consequences of his acts only, and if you should find from the evidence that the defendant's work upon the sink, and the removal of the stone and other debris, had not the effect reasonably to add to the volume of water finding its way into said sink, and to damage and injure plaintiff's spring, then you must find your verdict for the defendant." (6) Affirmative charge not to find for plaintiff under count 1. (7) "Before the plaintiff is entitled to recover damages of the defendant at your hands, he must reasonably satisfy you from the evidence that plaintiff's spring has been damaged by the act or agency of the defendant, and if, after you have considered all the evidence in the case, your mind is left in such doubt and uncertainty as to what the truth of the transaction inquired about reasonably is, then the plaintiff has failed to carry the burden the law imposes upon him, and your verdict must be for the defendant."

HOWARD & HUNT, for appellant. Charge 1 should have been given.—*Minard v. Currier*, 32 Atl. 472; *Miller v. Black Rock Springs*, 40 S. E. 27; *Ruber v. Merker*, 94 N. W. 354; 2 Words & Phrases, 1954. Counsel discuss the other charges given and refused but without further citation of authority.

BOYKIN & BAILEY, for appellee. The law governing the instant case has been well stated in *Willow Creek I. Co. v. Michaelson*, 51 L. R. A. 282. Percolating waters and those whose sources are unknown belong to the realty in which they are found.—*Bloodgood v. Ayres*, 15 N. E. 433, and cases there cited. None of the

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rules relating to water courses and their diversion apply to springs or wells.—Authorities next above. Charge 1 was therefore properly refused. Charge 2 was also properly refused.—6 L. R. A. 280. Charge 3 was properly refused.—25 Pa. 528; 45 Pa. 514; 106 Pa. 634, and authorities next above. It is, therefore, clear that the determination between rights in the surface and in subterranean waters is not founded on the fact of their location above or below ground, but on the fact of knowledge actually or reasonably acquired of their existence, location and courses. The owner of the soil may expel surface water from his own land to that of another without wrong, if done prudently and with due regard to the rights of lower owners.—20 L. R. A. 42; 9 Am. Rep. 573; Gould on Waters, sec. 263.

SIMPSON, J.—This action is by the appellant against the appellees.

The first count is for wrongfully diverting “a stream of water from its natural course, causing it to flow over and across the lands of plaintiff, thereby injuring his lands and crops.” The second count is for changing “the flow of surface water” on the land of defendants, “so that it overflowed plaintiff’s land and spring, in an artificial channel, doing great damage to his land and crops.” The third is for changing or diverting a stream from its natural channel, “so that it ran into plaintiff’s spring, thereby injuring the spring and water and plaintiff’s farm.” The fourth count is for building “a wall that diverted a stream of water from its natural channel, and caused it to flow into an underground channel that connected with plaintiff’s spring, thereby overflowing and injuring said spring”; and it is alleged that, “after defendant knew this or was in possession of facts and circumstances, which, if followed up, would

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have led to such knowledge, he refused or failed to remove said wall, and put the water thus directed back into its natural channel."

The testimony on the part of the plaintiff is that the farm of plaintiff is south of, and adjoining, the farm of defendant; that there was a spring on the land of plaintiff at the foot of a mountain; that a hole or sink, a little north of east and about one-fourth of a mile from said spring, made its appearance in a field of defendant during a wet season; that rock "was bursted up in the role, brush torn out, and gravel turned loose"; that the large rocks were taken out and small rocks and gravel fell through out of sight; that "they [defendant's employees] took a right smart of stuff out of the hole"; "that there was a waterway coming down the mountain hollow, and one channel of this waterway came within 10 or 12 feet of the hole, and another one came a little closer; that about one-third of the water was going into the hole at the time he worked in it"; that a rock wall was built by defendant's employees across the channel, the effect of which was to throw about one-third more water into the hole than was already going in; that a levee was built in defendant's field, and a ditch dug leading towards the sink hole, the effect of which was to drain the field and carry the water towards the hole; that the spring "would never get muddy before the sink hole came, and that, after it came, it would get muddy every time it rained, and that the same kind or color of water would come out of the spring as went into the hole"; that, before the hole came, the spring was always clear, except that it would sometimes get a little milky after a big rain; that tests had been made by putting various articles in at the hole, and that they or similar articles would afterwards be found in the spring; that the water that went into the hole would

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pour down into an underground cave or channel, out of sight.

The testimony on the part of the defendant tended to show that the spring would, at times, get muddy before the hole came, the same as it did afterwards; that the spring had not been damaged at all; that there was a large cave near the top of the mountain known as "Killian's Cave," about a half mile from the spring, and there were mud and trash on the sides of the walls of said cave, tending to show that the water would rise and fall therein; that tests had been made by putting oil and bran in said cave, which would come out at the spring; that one night, about the time testified to by plaintiff's witness, during a heavy rain, the bottom or bed of the mountain stream fell in at a point just at the foot of the mountain, making a hole eight or ten feet wide; that defendant, Kenneth Killian, had some rock and other things that had drifted into the hole taken out; that the great bulk of the water was running into the hole, before anything was done to clean out the hole or build the dam, etc.; that, after the sink hole fell in, a small cave was found underneath it, into which the water poured, and from the cave flowed in an underground channel, which was in places 30 or 40 feet high; that defendant's witnesses went down into said cave, and followed the stream for 200 or 300 feet in a northwestwardly direction; that the water from the sink hole went into said channel; that the point to which this channel was traced was 27 feet lower than plaintiff's spring (said spring being more than a quarter of a mile from the sink hole), and going in a direction opposite from the spring; that various tests were made by putting light articles into the sink hole, which never came out at the spring, also muddying the water at the sink hole, which had no effect on the spring; also that

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about 30 or 40 feet above the spring in question there is a hole, and, if light substances are placed in this hole, they come out in the spring; also, that there are indications of coal oil in said hole; that there is a hill or spur of the mountain between the sink hole and the spring. It is admitted by the plaintiff that said spring is not his only source of water for domestic purposes. It is also shown that the stream in which the sink hole occurred is only a wet-weather stream, running only in wet seasons.

It is evident that there was no testimony to sustain the first and second counts, nor is there any evidence to sustain the allegation in the third count, that plaintiff's farm was injured. Counsel for both parties cite a number of authorities on the subject of the rights of land-holders in percolating waters, and in subterranean streams, and the liability for diverting the same so as to cut off the source of supply in adjacent lands. There are a vast number of decisions on these subjects, which we do not deem it necessary to consider, as there is no such claim in this case. While it is true that, as to percolating water (that which merely filters or oozes through the soil), the owner of the soil may use or divert the same so as to deprive the adjacent owner entirely of it, while he may not divert an underground stream flowing in a definite known channel, though he may use it just as he may use a surface stream, yet the question here is what he may do with that part of the surface water which is collected in a definite channel. The maxim of the law is, "Aqua currit, et debet currere, ut currere solebat," so that a man may not gather the surface water, or change the channels which it has made, in such a way as to throw it in a body upon his neighbor's land, to his injury (3 Farnham on Waters & Waterways, p. 2574, § 885 et seq.; page 2710, § 935 et

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seq.) ; yet there is no evidence in this case to show that such a thing has been done. The claim here under the evidence is not that the water was collected or turned in such a way as to overflow and injure the adjoining lands, but only that, by turning the water into a natural hole in the ground, it found its way to the plaintiff's spring, and caused it to be muddy at times.

The question here is, Did the defendant, by the acts complained of, pollute the water in the spring of the plaintiff, and, if so, has the evidence furnished any criteria by which the liability of the defendant can be declared and the amount of the damage estimated; for the authorities recognize the principle that whatever may be the rights of a landholder in either the percolating water, or that which is gathered in defined and known subsurface streams, he cannot place anything in either which will pollute the springs or wells of his neighbors.—3 Farnham on Waters & Water Rights, p. 2730, § 945 et seq., and cases cited in notes.

In a case in Pennsylvania, where parties boring gas wells brought up salt water from a lower stratum, which injured fresh-water wells by rising therein, the Supreme Court of that state, after citing a number of cases on the rights in subsurface waters, held that: "If the existence of a stratum of clear water, and its flow into wells and springs of the vicinity, and the existence of a separate and deeper stratum of salt water which is likely to rise and mingle with the fresh, when penetrated, in boring for oil or gas, are known, and the means of preventing the mixing are available at reasonable expense, then clearly it would be a violation of the living spirit of the law not to recognize the change, and apply the immutable principles of right to the altered conditions of fact."—*Collins v. Chartiers Valley Gas Co.*, 131 Pa. 143, 159, 18 Atl. 1012, 1014, 6 L. R. A. 280, 283, 17 Am.

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St. Rep. 791, 795. In other words, that court held that it was a matter for determination whether the party boring was guilty of negligence under the facts as known.

Some cases hold that the party is not liable unless the act is done maliciously, it being *damnum absque injuria*; but the Supreme Court of Nebraska, after an exhaustive examination and classification of the authorities, concludes: "The most that can be said is that the defendant would not be liable for damages unless the injury was one which was the natural and probable consequence of his acts."—*Beatrice Gas. Co. v. Thomas*, 41 Neb. 662, 671, 59 N. W. 925, 928, 43 Am. St. Rep. 711. 717.

The Supreme Court of Pennsylvania holds that "damages resulting to another from the natural and lawful use of his land by the owner thereof are, in the absence of malice or negligence, *damnum absque injuria*, and that consequently one who mines coal on his land is not liable, though the water which percolates or flows therefrom may render the water of his neighbor totally unfit for domestic purposes."—*Penna. Coal Co. v. Sanderson*, 113 Pa. 126, 6 Atl. 453, 57 Am. Rep. 445.

An English case holds that merely making the water of a well temporarily muddy is too minute a damage to authorize a recovery.—*Taylor v. Bennett*, 7 Carrington & Payne (before Justice Coleridge), 329.

We find no cases in our own decisions directly on the facts of this case, but our court has held that the distinction between the diversion of streams and of surface water does not prevail in this state, and that if one changes the flow of surface water so as to discharge it injuriously on his neighbor's land, through a channel other than that through which it naturally flows, he is liable in an action of damages, but that the damages

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recoverable are only those which have accrued up to the commencement of the suit.—4 Mayfl. Dig. 1131; *Central of Georgia Railway Co. v. Windham*, 126 Ala. 552, 28 South. 392, and cases cited; *Hughes v. Anderson*, 68 Ala. 280, 44 Am. Rep. 147.

Our court also holds that an action lies for “the casting upon one’s land of dirt and foul water, or substances which reach the stream by percolation; * * * the letting off of water made noxious by the precipitation of minerals, * * * or rendering the water unfit for domestic, culinary, or mining purposes, or for cattle to drink of, or for fish to swim in, or for manufacturing purposes.”—*Atlanta & Birmingham Air Line Ry. v. Wood*, 160 Ala. 657, 663, 49 South. 426, 428.

As said by Stone, J., in the *Hughes-Anderson Case*, 68 Ala. 285, 286 (44 Am. Rep. 147), “this rule cannot be enforced in its strict letter,” and due regard must be had to the right of the defendant to properly care for his own property. “It is not, however, to be understood that, because the flow of water must not be caused by the act of man, that, therefore, the proprietor who transmits water to the inferior heritage is not permitted to do anything on his own land—that he is condemned to abandon it to perpetual sterility, or never vary the course of cultivation, simply because such acts would produce some change in the manner of discharging the water. The law intends not this. * * * It is not more agreeable to the laws of nature that water should descend than it is that lands should be farmed and mined; but in many cases they cannot be, if an increased volume of water may not be discharged through natural channels and outlets. * * * Under these rules, the defendant had no right by ditches or otherwise to cause water to flow on the lands of plaintiffs, which, in the absence of such ditches, would have

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flowed in a different direction. As to the water theretofore accustomed to flow on the lands of the plaintiff, defendant was not bound to remain inactive. He was permitted to so ditch his own lands as to drain them, provided he did so with a prudent regard to the welfare of his neighbor, and provided he did no more than concentrate the water, and cause it to flow more rapidly, and in greater volume on the inferior heritage. * * * It is a question for the jury to determine, on the facts of each particular case, under proper instructions from the court."

Under these authorities, we hold that in this case it was a question for the jury to decide whether the disposition of the water by the defendant was a prudent and proper disposition of the water for the protection of his own property, with a proper regard for the interests of his neighbor, in view of the improbability of said water's reaching the spring of his neighbor and injuring it.

There was no error in the refusal to give charge 1, requested by the plaintiff, because "water naturally" flowing through a channel is not necessarily "a known and well-defined channel," and for the further reason that, under the principles laid down, it is abstract.

There was no error in refusing to give charge 2, as, if not otherwise bad, it was misleading. The question as to whether the defendant knew that the water would flow into plaintiff's spring was a matter for the jury to consider in determining whether it was a prudent disposition of the water, with due regard to the interests of his neighbor.

Charges 3 and 4 took from the jury the determination of the prudence and propriety of the action of the defendant under the principles laid down.

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Charges 1, 2, 3, 4, 5, 6, and 7, given at the request of the defendant, are evidently correct.

There was no error in that part of the oral charge excepted to.

The judgment of the court is affirmed.

Affirmed. All the Justices concur.

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Malicious Prosecution.

(Decided November 28, 1911. 56 South. 971.)

1. *Pleading; Amendment; New Cause of Action.*—Where the complaint set out that an alleged prosecution was commenced before K., clerk of the county court, and there was no showing made that the causes of action were the same, it was proper to disallow a proposed amendment setting up a prosecution for a similar crime instituted before O., a justice of the peace.

2. *Malicious Prosecution; Burden of Proof.*—Where the action is for malicious prosecution, the burden is upon plaintiff to establish that the defendant maliciously prosecuted him, or caused him to be prosecuted, without probable cause, that the prosecution was ended and that plaintiff was damaged in consequence of the prosecution.

3. *Same; Malice; Want of Probable Cause.*—If there are no circumstances to rebut the inference, malice may be inferred from want of probable cause for instituting the prosecution.

4. *Same; Acts and Conduct.*—Where such conduct will admit of no other reasonable construction, malice in instituting the prosecution may be inferred from defendant's acts and conduct.

5. *Same; Acts of Plaintiff.*—Acts of plaintiff occurring after the commencement of a malicious prosecution are not admissible for the purpose of rebutting malice or showing probable cause, since defendant could have had no knowledge or notice of them when the prosecution was begun; hence, evidence that plaintiff broke jail and escaped after his arrest, and was thereafter re-arrested was not admissible.

6. *Same; Probable Cause.*—As employed in actions for malicious prosecution, the term probable cause means such a state of facts in the mind of the prosecutor as would lead a man of ordinary caution or prudence to believe or entertain an honest and strong suspicion that the person is guilty of the crime alleged.

7. *Same; Want of Probable Cause; Innocence of Accused.*—As a prosecution will not become malicious by reason of the innocence of

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the plaintiff, unless the prosecutor had knowledge thereof, evidence of innocence does not become admissible where the prosecutor is not chargeable with notice of the facts sought to be introduced; hence, evidence of the facts occurring after the commencement of the prosecution was not admissible to show malice or want of probable cause, though possibly admissible to show the termination of the prosecution.

8. *Same; Burden of Proof.*—A showing of the acquittal of the plaintiff of the charge alleged to have been maliciously instituted lifts from plaintiff the burden of showing want of probable cause.

9. *Same; Damages; Necessity to Allege.*—Where no specific claim was made therefor in the complaint in an action for malicious prosecution, evidence as to the condition of the plaintiff's wife while he was in prison being a matter of special damages, was properly refused.

10. *Same; Instructions.*—Where charges embrace items of special damages not claimed in the complaint, they are properly refused.

11. *Charge of Court; Undue Prominence.*—Although a charge asserts a correct principle of law it may be refused if it gives undue prominence to a certain portion of the evidence.

(Somerville, J., dissents in part.)

APPEAL from Coffee Circuit Court.

Heard before Hon. H. A. PEARCE.

Action by William J. Hanchey against John F. Brunson. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

The third count was for false imprisonment, declaring on a warrant issued by R. A. King, clerk of the county court of Coffee county, on December 3, 1908, on a charge of embezzlement. The amendment proposed set up that the warrant was issued by Gus Owens, a justice of the peace of Coffee county, on December 3, 1908, on a charge of embezzlement. The facts sufficiently appear in the opinion of the court.

The following charges were refused to the plaintiff.
(1) "The court charges the jury that the fact, if it be a fact, that the defendant instituted against the plaintiff prosecutions for two separate offenses on the same day, is a circumstance to which the jury may look in determining whether or not either or both of such pros-

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ecutions was begun with a malicious motive." (3) "The court charges the jury that, if they believe from the evidence in this case that the plaintiff was tried and acquitted of the charge of violating a rental contract as claimed in count 1 of the complaint, then this lifts from him the burden of showing want of probable cause as to said count." (4) "The court charges the jury that, if they find for the plaintiff as to count 1 of the complaint, they should assess the damages at such an amount as the plaintiff may have suffered as the direct, natural and proximate result of such prosecution, by reason of the loss of time required in defending himself, loss of time spent in prison, injury to same, reputation, character and health, mental suffering, general impairment of social and commercial standing, and decrease in earning capacity, the same being limited to the amount claimed in the respective count." (5) "The court charges the jury that, if they find for the plaintiff as to the first count of the complaint, they should assess the damages at such an amount as the plaintiff suffered as the direct, natural, and proximate result of such prosecution, by reason of the loss of time required," and continuing same as charge 4.

A. G. SEAY, for appellant. The amendment should have been allowed.—Sec. 5367, Code 1907; *Crim v. Crawford*, 29 Ala. 623; *C. of Ga. v. Foshee*, 125 Ala. 221; *Mohr v. Lemle*, 69 Ala. 180; *Buchanan v. Larkin*, 116 Ala. 431; *L. & N. v. Woods*, 17 South. 41; *Rickets v. Weeden*, 64 Ala. 548; *Karter v. Fields*, 140 Ala. 363. The court erred in permitting it to be shown that Hanchey got out of jail and staid out awhile.—26 Cyc. 87. The court erred in not permitting evidence as to the condition of plaintiff's wife while he was in prison.—*Killebrew v. Carlisle*, 97 Ala. 535. The court erred in refusing the charges.—

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61 Ill. App. 428; *Lunsford v. Dietrich*, 9 South. 308; *Marks v. Hastings*, 13 South. 297; *Killebrew v. Carlisle, supra.*

J. A. CARNLEY, for appellee. The amendment sought to introduce a new cause of action, and hence, was properly refused.—*Johnson v. Martin*, 54 Ala. 271; *Springfield F. & M. I. Co. v. DeJarnette*, 111 Ala. 257; *Babcock v. Carter*, 117 Ala. 579; *Mont. T. Co. v. Fitzpatrick*, 149 Ala. 511; Sec. 5367, Code 1907; 31 Cyc. 406; *C. of Ga. v. Foshee*, 125 Ala. 199. The conduct of plaintiff in breaking jail was competent evidence.—26 Cyc. 23, 36 and 37; 8 Enc. of Evi. 395. The condition of plaintiff's wife was not relevant. The charges were properly refused.—*Lunsford v. Dietrich*, 86 Ala. 250; S. C. 93 Ala. 565.

MAYFIELD, J.—It is not made to appear from this record whether the proposed amendment to count 3 made an entirely new cause of action, or merely described differently the same cause of action.

A prosecution instituted by affidavit before "K," clerk of the county court, is *prima facie* a different prosecution from one instituted by an affidavit made before "O," a justice of the peace, though the affiant and the crime be the same in both cases. This being true, we cannot say that the court erred in refusing to allow the proposed amendment to count 3. If it has been shown that the original and amended counts related to the same transaction and prosecution, it should have been allowed, under our liberal system; and under the statute, as last amended, the question of the identity of the causes of action relied on in the original and amended counts may be submitted to the jury. But, so far as this record shows, the prosecutions were differ-

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ent; and the amendment, therefore, was not allowable.

In trials for malicious prosecution, under the general issue, the burden of proof is upon the plaintiff to establish, by a preponderance of the evidence, three propositions: First, that the defendant has prosecuted complainant, or caused him to be prosecuted, as alleged in his complaint, and that the prosecution is ended; second, that the prosecution on the part of the defendant was both malicious and without probable cause; third, that in consequence of the prosecution complainant was damaged.—2 Greenl. Ev. 449, 450. In this case it was not disputed that the prosecution was instituted by the defendant, and that it was ended by the verdict of a jury, acquitting plaintiff, on a trial in a court of competent jurisdiction. So the questions in dispute were malice, probable cause on the part of the defendant in instituting the prosecution, and the damages, if any were sustained.

Malice may be inferred from the want of probable cause, if there are no circumstances to rebut the inference. It may also be inferred from acts and conduct of defendant if the defendant's conduct will admit of no other reasonable construction. Mr. Greenleaf said: "The want of probable cause is a material averment; and, although negative in its form and character, it must be proven by the plaintiff by some affirmative evidence." There are some exceptions to the rule, not necessary here to be mentioned.

Shaw, C. J., has said that "probable cause," as the term is employed in actions for malicious prosecution, is such a state of facts in the mind of the prosecutor as would lead a man of ordinary caution and prudence to believe or entertain an honest and strong suspicion that the person arrested is guilty.—*Bacon v. Towne*, 4 Bush. (Mass.) 238.

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It has been uniformly held that the plaintiff's innocence of the charge on which the prosecution was brought, and any facts which tend to show such innocence, are admissible only as tending to prove the defendant's lack of probable cause in instituting the prosecution; and therefore it must be shown that the defendant knew of such innocence, or of such facts, when he brought the prosecution. The plaintiff's innocence does not make the prosecution malicious, nor prevent the defendant from having probable cause to believe him guilty. Therefore, evidence of innocence, of which the defendant had no knowledge, and of which he was not chargeable with notice, such as facts occurring after the prosecution is begun, are not admissible for the purpose of showing malice or want of probable cause, though it may be to show that the prosecution was terminated, such as the trial and its result.

For the same reason, acts of the plaintiff occurring after the prosecution is begun, of which the defendant could have had no knowledge or notice, are not admissible to rebut malice or show probable cause at or before the prosecution was begun.

These two rules are well illustrated in the case of *Killebrew v. Carlisle*, 97 Ala. 535, 12 South. 167; and *Joselyn v. McAllister*, 25 Mich. 45. In the first case it is said: "The defendants had instituted a prosecution against plaintiff for the purpose of having him bound over to keep the peace. A part of the evidence relied on as going to show that he was about to commit breaches of the peace upon the persons of the defendants were to the effect that while defendants were in possession of the land, and engaged in gathering the crop therefrom, plaintiff went on the land, where the crop was growing, with his gun, and said that if the defendant, who had harvested a part of the crop, at-

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tempted to gather what remained of it he (the plaintiff) would shoot him. The fact of plaintiff's being there with his gun, taken in connection with the information received by defendant of the alleged threat to use it, tended to show, of course, that defendants had probable cause for believing that plaintiff intended to commit a breach of the peace. If it was plaintiff's habit 'to carry his gun with him to the field and going to his plantation to work,' and this habit *was known to the defendants*, evidence of it was admissible as tending to show that the presence of the weapon on the particular occasion was due to this custom of plaintiff, and not to any purpose on his part to use it in the commission of a breach of the peace; but there is no evidence that defendants had any knowledge of this habit, and we are unable to see that the fact of its existence, if wholly unknown to them, could have exerted any influence in determining the question of defendants' malice, or whether they had probable cause for believing plaintiff intended to commit violence upon their persons. Yet it is very probable that it was accorded an influence by the jury. The testimony of this habit, without any evidence that defendants knew of it, was therefore improperly admitted, and must operate a reversal of the judgment."

In the latter case, the rule is well stated in the head-note, which the opinion supports, as follows: "Malice in making an affidavit for an arrest cannot be disproved by transactions of the party arrested, of which the person making the affidavit had no knowledge or information when he made it. Neither can it be disproved by showing additional facts having no bearing on the facts set forth in the affidavit as grounds of arrest, nor by matters *ex post facto*."

For this reason, we think the trial court erred in allowing the defendant to prove, over the objections of

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the plaintiff, that the latter broke jail, escaped, and was thereafter re-arrested. This, of course, was all ex post facto, as to the institution of the prosecution, and could not have influenced the defendant in instituting the prosecution. It neither showed nor tended to show malice, or probable cause, or lack of either. It was wholly inadmissible on this trial, and its only effect could be to prejudice the jury against the case of the plaintiff. Such evidence would have been admissible, of course, on a criminal trial, but not in this action, which was to determine whether the prosecution was instituted with malice, and without probable cause.—*Gulsby v. L. & N. R. Co.*, 167 Ala. 131, 52 South. 392.

As to the court's declining to admit evidence touching the condition of plaintiff's wife at the time he was in jail, as an element of damages, it is sufficient to say that such damages, if recoverable, are special, and must therefore be specifically claimed to warrant recovery; and there was in the complaint in this case no claim as to such damages.

The fourth and fifth charges requested were properly refused for the same reason; each embraced items of special damages, not specifically claimed in the complaint.

"The rule of law is that special damages must be particularly specified in the statement of the claim, declaration, or complaint, or the plaintiff will not be permitted to give evidence of such damages at the trial.

"The law stated by Greenleaf: Where the damages, though the natural consequences of the act complained of, are not the necessary result of it, they are termed special damages, which the law does not imply, and therefore, in order to prevent a surprise upon the defendant, they must be particularly specified in the declaration.

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"The law stated by Chitty: Whenever the damages sustained have not necessarily accrued from the act complained of, and consequently are not implied by law, then, in order to prevent the surprise of the defendant which might otherwise ensue on the trial, the plaintiff must, in general, state the particular damage which he has sustained, or he will not be permitted to give evidence of it. Thus, in an action of trespass and false imprisonment, when the plaintiff offered to give in evidence that during his imprisonment he was stinted in his allowance of food, he was not permitted to do so, because the fact was not, as it should have been, stated in his declarations."—Newell, *Mal. Pros.* §§ 11, 12, pp. 410, 411.

The seventh assignment of error is not good. The requested charge, though asserting a correct principle of law, in effect gave undue prominence to a certain part of the evidence.

Charge 3 asserted a correct proposition of law as to shifting the burden of proof from plaintiff, and, there being evidence to support it, its refusal was error.

While there is some conflict in the decisions as to the correctness of the proposition asserted in this charge, our court has adopted the line which supports its correctness. In the cause of *Lunsford v. Dietrich*, 93 Ala. 565-570, 9 South. 308, 310 (30 Am. St. Rep. 79), it was said: "We have seen that the inference of malice may be drawn from a want of probable cause; and the fact that Dietrich had been tried and acquitted of the offence charged was itself some evidence—sufficient, it seems, to lift the burden of proof in that regard off the plaintiff—of a want of probable cause.—*Josselyn v. McAllister*, 25 Mich. 45; *Vinal v. Core*, 18 W. Va. 1."

The authorities are reviewed in Newell on Malicious Prosecution, pp. 282, 283.

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The Supreme Court of Missouri has drawn a distinction, which seems to have in it much of reason, between acquittals on final trial and discharges on preliminary hearings, or refusals or failures to indict. The distinction is thus outlined by Mr. Newell, in a note to his work on Malicious Prosecution (page 283): "The verdict of a jury upon the trial of a civil action is essentially different from the discharge of a supposed criminal by the examining magistrate, or upon a bill of indictment ignored by a grand jury. Even in the criminal proceeding, the final acquittal of the accused can have but little weight, as evidence of probable cause, compared with an acquittal or discharge before the magistrate or grand jury. The magistrate and grand jury have the very question of probable cause to try; and the evidence on the side of the prosecution is alone examined, and proceeding is entirely *ex parte*. Under such circumstances, the refusal of the examining tribunal to hold the accused over till tried must necessarily be very persuasive evidence that the prosecution is groundless.

—*Brant v. Higgins*, 10 Mo. 728."

Mr. Greenleaf (Ev. vol. 2, § 435, pp. 435, 436) says: "The discharge of the plaintiff by the examining magistrate is *prima facie* evidence of the want of probable cause, sufficient to throw upon the defendant the burden of proving the contrary. But in ordinary cases it will not be sufficient to show that the plaintiff was acquitted of an indictment by reason of the non-appearance of the defendant, who was the prosecutor; nor that the defendant, after instituting a prosecution, did not proceed with it; nor that the grand jury returned the bill, 'Not found.' "

Mr. Newell, after reviewing the authorities (Mal. Pros. p. 290), says: "Our courts, however, seem to be settling down to the rule that the discharge of a person

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accused of crime by a committing magistrate, or the ignoring of like charges by a grand jury, and similar adjudications, are *prima facie* evidence of the want of probable cause, sufficient to cast upon the opposite party the burden of proving the contrary. On the other hand, the waiving of a preliminary examination, the disagreement of a jury, their hesitation in finding a verdict of acquittal, requiring the accused to enter into a recognizance by an examining magistrate, the finding of an indictment by a grand jury, have been held to be *prima facie* evidence of the existence of probable cause." But he adds that the want of probable cause is not shown by the acquittal of the accused, meaning evidently *not conclusively shown*, though he does not say so.

The Supreme Court of Appeals of West Virginia, in the case of *Vinal v. Core*, 18 W. Va., 1, made an extended review of the authorities on the question, and concluded as follows, as to the shifting of the burden of proof: "There is some difference of opinion whether an acquittal of the plaintiff on the trial by a jury is *prima facie* evidence of a want of probable cause; many cases holding that it is not. But it is obvious that there is a great difference between the acquittal of the plaintiff by a jury and his discharge by an examining magistrate, or the refusal of a grand jury to indict. It would be the duty of the jury to acquit the defendant, if on all the evidence there was a reasonable doubt of his guilt, even though they might believe he was probably guilty of the crime. But the magistrate or grand jury would violate his or their duty, if he or they discharged the accused when the evidence produced the belief that he was probably guilty of the crime. He or they act directly on the question whether there is probable cause for the prosecution; and if he or they discharge him it must be because in his or their judgment there is no probable

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cause for the prosecution; and accordingly the weight of authority and of reason is that such discharge by a justice or by a grand jury is *prima facie* evidence that there is a want of probable cause for the prosecution.—See *Nicholson v. Coghill*, 6 Dow. & Ry. 13, 14, and 4 Barn. & Cress. 21-24; *Johnson v. Martin*, 7 N. C. 248; *Plummer v. Gheen*, 10 N. C. 66-68 [14 Am. Dec. 572]; *Johnson v. Chambers*, 32 N. C. 287-292; *Bostick v. Rutherford*, 11 N. C. 83-87; *Williams v. Norwood*, 2 Yerg. [Tenn.] 329-336. There are, it is true, some authorities to the contrary.—See *McRae v. Oneal*, 13 N. C. 166-169, and especially *Israel v. Brooks*, 23 Ill. 578. But, of course, such a discharge is but *prima facie* evidence, and it may be rebutted, as the above authorities show."

Our court having adopted one of these lines, and having cited the West Virginia case, we are not now willing to depart therefrom, whatever might be our opinion, if it were a new question.

Reversed and remanded.

DOWDELL, C. J., and SIMPSON, ANDERSON, McCLELLAN, and SAYRE, JJ., concur. SOMERVILLE, J., concurs in reversal, but dissents from last proposition of the opinion.

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Malicious Prosecution.

(Decided June 15, 1911. Rehearing denied December 21, 1911.
57 South. 42.)

1. *Malicious Prosecution; Defense; Consulting Attorney.*—The fact that defendant consulted a reputable attorney before instituting the alleged prosecution and that the attorney advised the prosecution is not of itself a complete defense to an action for malicious prosecution.

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2. *Same; Evidence.*—Where the action was against a corporation for malicious prosecution on a charge of enticing defendant's employees away, it was competent for plaintiff to show that the deputy sheriff who arrested him was appointed at defendant's request as shedding light on whether he was acting as defendant's agent in arresting plaintiff, and not in his official capacity.

3. *Same; Jury Question.*—Under the evidence in this case it was a question to be determined by the jury whether the prosecution was instituted in good faith on advice of counsel.

4. *Same; Probable Cause.*—The evidence examined and held not to show that there was probable cause for belief on defendant's part that plaintiff was guilty of the offense for which he was prosecuted.

5. *Same; Punitive Damages.*—Punitive damages may be recovered for a malicious prosecution.

6. *Damages; Punitive; Jury Question.*—The amount of damages allowable in an action for malicious prosecution is a question for the jury under proper instruction; punitive damages being recoverable.

7. *Appeal and Error; Objection Below; Necessity.*—An objection that evidence was a mere opinion or conclusion cannot be first asserted on appeal where the objection below was upon another ground.

APPEAL from Madison Law and Equity Court.

Heard before Hon. TANCRED BETTS.

Action by E. R. Grogan against Abingdon Mills for damages for malicious prosecution. Judgment for plaintiff and defendant appeals. Affirmed.

COOPER & COOPER, and PAUL SPEAKE, for appellant. Under the evidence defendant was guilty of the offense for which he was prosecuted.—3 Words & Phrases, 2410; 8 Id. 7651; 99 N. W. 541; 9 N. W. 487. Charges 11 and 12 should have been given.—*Fleming, et al. v. L. & N.* 148 Ala. 527; *Lynch v. Sneed*, 21 L. R. A. (N. S.) 852; *Fla. E. C. R. R. Co. v. Groce*, 46 South. 294; *Bacon v. Townes*, 4 Cush. 217; *Farris v. Starkes*, B. Monroe 4. Under the evidence in this case the question of probable cause was one for the court.—*Rich v. McIntry*, 103 Ala. 357; *McDaniel v. Cain*, 48 South. 52; *Lundsford v. Dietrich*, 86 Ala. 250; *Sanders v. Davis*, 153 Ala. 375; 26

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Cyc. 26; *Shannon v. Sims*, 146 Ala. 678. Advice of counsel was a full and complete defense.—*Shannon v. Sims, supra*; *Abingdon Mills v. Grogan*, 52 South. 596; *O'Neal v. McKenna*, 116 Ala. 606; *Motes v. Bates*, 80 Ala. 382.

DOUGLAS TAYLOR, M. H. LANIER, and P. I. DRAKE, for appellee. This cause should be affirmed on the authority of *Abingdon Mills v. Grogan*, 52 South. 596. Advice of counsel is not always a complete defense.—*McLeod v. McLeod*, 73 Ala. 42. The court was not in error in refusing a new trial because of the size of the verdict.—*Nat. Sur. Co. v. Mabry*, 149 Ala. 217. Objections not raised to evidence in the lower court cannot be advanced for the first time on appeal.—*Rhodes v. King*, 52 Ala. 272.

MAYFIELD, J.—This was an action by appellee against appellant to recover damages for malicious prosecution. The case was ultimately tried on counts 1 and 3. There are no special pleas to these counts. Each declares upon a separate prosecution. This is the second appeal in this case; the first being reported in 167 Ala. 146, 52 South. 596. A number of the questions presented for review on this, the second appeal, were decided in the former; and as to these we see no reason to depart from our ruling heretofore announced.

The first insistence is that the plaintiff was guilty of enticing away employees of the defendant. This was the offense for which he was prosecuted; or at least the evidence showed conclusively that there was probable cause for believing him to be guilty of such offense, and that therefore the defendant should not be held liable to a civil suit for instituting this prosecution against the plaintiff.

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We cannot agree with counsel in this contention. It was ruled on the former appeal in this case—if not expressly, by necessary implication—that under the evidence this was a question of fact for the jury, and that the trial court properly submitted it to the jury, under correct instructions. And there is no such difference between the evidence adduced on the first trial and that brought out on the second as to warrant the court's withholding this question from the jury.

The plaintiff, when arrested on these charges, waived a preliminary trial and gave bond to appear and answer any charge that might be preferred by the grand jury. The grand jury failed to indict the plaintiff, in either case, for the offense charged, but did return an indictment against him for carrying on the business of emigrant agent without a license—which of course, was an offense separate and distinct from that of which he was charged.

It is next insisted that the prosecution of the plaintiff was instituted by the agents of the defendant, on the advice of reputable practicing attorneys, given on a full and fair statement of all the facts known to the affiant, or which by proper means could have been ascertained.

It is sufficient to say, as to this insistence, that whether or not that was done in the manner, to the extent, and with the purpose, to make it a complete defense to the action, was a question of fact for the jury, and not one of law for the court; and that the court did not err in submitting these questions to the jury under proper instructions, which the trial court seems to have given.

The mere fact that a person desiring to institute a prosecution consults a reputable attorney before so doing, and that such attorney advises the prosecution, does

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not of itself amount to a complete defense to an action for maliciously instituting such prosecution. All this might be done, and yet the prosecution be maliciously instituted.

Whether the affiant made a full and fair statement of the facts to the attorney, whether he used proper diligence in order to ascertain the facts, and whether he consulted the attorney for the purpose of obtaining the advice of such attorney and acting upon it rather than upon his own judgment, or for other motives, were in this case (and are usually) questions of fact for the determination of the jury.

All the evidence in this record has been carefully read and considered, and we have reached the conclusion, not only that the trial court correctly submitted these questions of fact to the jury, but also that the action of the court was proper, in declining to award a new trial on account of insufficiency of the evidence, or on the ground that the jury acted contrary to the instructions of the court upon this question.

We do not think that the court erred in allowing secondary proof as to the contents of the affidavit and warrant. The case was reversed on the former appeal, and one of the grounds of the reversal was the admissibility of this secondary evidence.

The trial court evidently attempted to comply with the rule announced by this court on the former appeal, as to the admission of such evidence. The secondary proof was made by the officer who issued the warrant, and before whom the affidavit was taken, and he, of course, was the proper custodian of it. He testified that it was lost, and that he had made unavailing search for it; that the papers had gone up to the grand jury; and that the lost papers were not those of which plaintiff was custodian, but were quasi records of the proceedings in the justice court.

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It is insisted in the argument by the appellant that the secondary evidence of the witness, as to the contents of the affidavit and warrant, was a mere opinion or conclusion. This was not one of the grounds of objection assigned to the introduction of such proof, nor of the motion to exclude, and that question cannot be raised, for the first time, on appeal. The trial court evidently did not have that question presented to it for decision.

It was ruled on the former appeal that the fact that Sanders, one of the defendant's agents, was appointed a deputy sheriff at the instance of the defendant, was a material inquiry. We can see no reason to recede from what we then said upon that question. The facts that the defendant's agent was thus, as its request, appointed to be a deputy sheriff, and that this agent, as such deputy, arrested the plaintiff under the warrant, the basis of this prosecution, were certainly a material inquiry upon this trial. Hence there was no error in allowing proof to be made as to such facts. As was said in this court in the former opinion, if he acted in the matter solely as a deputy sheriff and not as the agent of the defendant, the defendant could not be held liable; but, on the evidence in this case, it was certainly a question for the jury to say in what capacity he acted in instituting the prosecution against the plaintiff.

We are not prepared to say that the trial court erred in declining to grant the defendant's motion for a new trial. While the verdict and judgment are larger than usual in such cases, we cannot say that the award was the result of the bias, prejudice, or other improper motive or influence, on the part of the jury. There was evidence sufficient to warrant punitive damages. Each count declared upon a separate prosecution, which was alleged to be malicious; and this we have held to be also a question for the jury. If they believed from the evi-

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dence that the plaintiff had made out his case and was entitled to recover, and that the prosecution was malicious, wanton, and without probable cause, they were justified in awarding punitive damages. The amount of damages, in such cases, is a question for the jury, under proper instructions by the court.

While there may be instances in which the trial court or an appellate court could set aside a verdict because so excessive as to show that the jury were influenced by improper motives or agencies, rather than by the evidence, in fixing the amount, we think that this is not such a case. The verdict as originally rendered was for \$6,000; and, upon the motion for a new trial on the ground that the verdict was excessive, the trial court, which had heard all the evidence and had every opportunity to observe the witnesses, announced that a new trial would be granted, for this reason, unless the plaintiff remitted \$2,000 of such verdict; whereupon the plaintiff in open court remitted \$2,000 of the verdict, and the court then overruled the motion for a new trial and rendered a verdict for \$4,000.

After a careful examination of all the evidence in this case, and due consideration of the fact that the suit was for two malicious prosecutions, we are not willing to put the trial court in error for declining to award a new trial, after the plaintiff had remitted \$2,000 of the damages as fixed by the verdict of the jury.

Finding no error, the judgment of the trial court must be affirmed.

Affirmed.

SIMPSON, ANDERSON, and McCLELLAN, JJ., concur.

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ON APPLICATION FOR REHEARING.

MAYFIELD, J.—It is most earnestly insisted by counsel for appellant that a rehearing should be granted in this case; that there is manifest error in this record, in that the trial court should have given the affirmative charge, as requested, to find a verdict for defendant.

After several careful examinations of this record, we are not able to agree with the contention of counsel for appellant, for the following reason, which we will again epitomize, on account of the repeated and earnest insistences of counsel for appellant.

The action is for malicious prosecution, claiming damages as for two malicious prosecutions of plaintiff by the defendant, on the charges of "enticing away laborers" of the defendant. The undisputed evidence shows that these two prosecutions, as alleged, were instituted and prosecuted by the agents of the defendant, and that the grand jury failed to indict in both cases, and that the prosecutions were ended in favor, and by the discharge, of plaintiff before this action for malicious prosecution was begun; that the plaintiff was arrested, detained, and imprisoned in jail, in consequence of the prosecution, and as the result of the acts, agency, and advice, of the defendant or of its attorney.

These facts being undisputed, they were certainly sufficient to carry the case to the jury upon the general issue.

The defendant undertook to rebut plaintiff's case, and to show that there was probable cause for the institution of the prosecutions, and that there was no malice, which, if conclusively done, would have entitled it to the affirmative charge.

But was the evidence conclusive as to this? We think not.

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It is most earnestly insisted by counsel for appellant, on this rehearing, that plaintiff was actually guilty of the charges preferred by the defendant, and for which he was prosecuted, notwithstanding the grand jury had twice refused to indict him on an ex parte hearing. Our answer to this is that, if that is true, the record before us does not so show it; and of course we are bound by the record. We do not so find that all evidence in this record shows that plaintiff was guilty as charged, or that there was probable cause for defendant's agent's believing him to be so guilty.

The mere fact that plaintiff was in Huntsville on the occasion when arrested, for the purpose of accompanying certain persons from Huntsville to Atlanta, and to pay their transportation and expenses, and that those persons were employees of defendant, does not conclusively show that plaintiff had enticed such employees away from defendant, within the meaning of the Criminal Code. Certainly plaintiff's evidence did not show conclusively, nor admit, that he was guilty of the criminal offense charged. A part of his evidence is as follows. "The charge on which I was arrested from Vaught's court was 'enticing laborers from the Abingdon Mills.' I did not solicit anybody, and did not offer anybody any sum of money or higher wages at all. I came here with the money for the purpose of paying transportation of certain hands who had already been hired to go to Atlanta. I did not employ or offer to employ any one, and did not have any authority from the Fulton Bag & Cotton Company to employ anybody, or offer any hands employment. After my arrest, and after I made bond, I went back to Atlanta that afternoon. I did not return to Huntsville until the following January, when I came back for trial. I was tried for carrying on the business of an emigrant agent, with-

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out license, and was tried in this courthouse. Mr. Pride and Capt. Humes were the attorneys for the prosecution on my trial for carrying on the business of an emigrant agent. Mr. Sanders and Mr. Herring and Mr. Brown were all present at the trial, and I think they were all witnesses against me, and they were assisting the attorneys. Immediately after that trial I was re-arrested in the courthouse before I had gotten out of the courthouse, on a charge of enticing away laborers from the Abingdon Mills. * * * When I was carried up to Mr. Vaught's office that night in August, Mr. Herring said to me, 'I am glad we got you, old fellow, not on your account, but on account of the Fulton Bag & Cotton Mills.' Mr. Herring was assistant superintendent of the Abingdon Mills."

There is abundant evidence in this record tending to show that the arrangement for the hands to go from the Huntsville Mill to the Atlanta Mill were made by correspondence between the Huntsville employees and the Atlanta employers, and without any criminal participation therein on the part of this plaintiff or of any other person. We do not understand that this statute absolutely prohibits employees of one cotton mill from ever seeking or obtaining employment elsewhere, and that, if they ever do thereafter obtain employment in another mill, all other persons who aid them in going to such new employer or cotton mill are guilty of violating this statute.

The plaintiff further testified: "The only parties whose expenses or debts I had authority to pay were shown by some letters I had, which were written to Mr. S. F. Brown. The hands I now remember were Maggie Couch, and Bessie Merritt. That money was simply an advance on the part of the mill to these people. When I was in Huntsville before, in 1906, I was here as a

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drummer, and did not know anything about the Abingdon Mills. I did not make any contract with Maggie Couch and the parties who came to see me at the hotel. I notified them that I was here for the Fulton Bag & Cotton Mills, to carry them back to Atlanta, and that I would buy the tickets, pay freight on household goods, etc. I did not offer any money to any others."

The defendant also insists that it was entitled to the affirmative charge, for the reason that the prosecutions were instituted and prosecuted under the advice of counsel, and were therefore with probable cause and without malice.

We do not think the evidence in this case was so conclusive as to take the questions from the jury. It is true that the evidence does show that two attorneys were consulted and advised with, about the prosecutions; but it also shows that one of these attorneys was a stockholder, an officer, and a director, of the defendant corporation, and that he was employed by it to prosecute the plaintiff, in addition to the prosecuting attorney for the state. The other attorney consulted was the county solicitor. He was twice examined as a witness, and testified, in part, as follows: "Capt. Humes assisted me in the trial of the case against Grogan, in the law and equity court, and suggested the writing of this affidavit. He assisted me in prosecuting Mr. Grogan, and it was at his suggestion and dictation that I made out this affidavit. That affidavit and warrant were written in the courtroom immediately after the trial of Grogan on the charge of carrying on the business of an emigrant agent without license. The matter was discussed with Mr. Brown, Mr. Herring, and Mr. Sanders, my recollection is, in the courtroom. We discussed the verdict in the other case, and then it was that this complaint was prepared, and the warrant issued. Brown and Herring

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and Sanders did all the talking to me all the time. I did not request Capt. Humes to assist in the prosecution of that case. Mr. Brown told me that they were going to have Capt. Humes assist. I told Mr. Sanders and Mr. Herring and Mr. Brown, when they came to consult me about having Grogan arrested, that I thought it would be best to wait until we could find out that some of the employees had signed up, or gone to the depot, to be there and see that they started to move to the depot. I wanted them to be sure and know that he was here for that purpose before they made any arrest. I advised them all the time not to make arrest until they were certain that he had committed some overt act before he was arrested, and I felt that we would be pretty certain of his guilt if he had done these things that I have related. When the affidavit was sworn out in the courtroom after the first trial, Capt. Humes and I and Mr. Sanders were present, and I think Mr. Brown, Capt. Humes, and I heard all the evidence on the trial of Grogan for carrying on the business of an emigrant agent. Capt. Humes was a reputable practicing attorney and dictated the affidavit to me, after we had heard all the evidence. I concurred with Capt. Humes, in thinking that, under the evidence in that case, Grogan was guilty of enticing away laborers; but I thought at the time, and so told Capt. Humes that I thought, it would be dangerous for the company to swear out the second affidavit. I did not think it good policy to swear out the second affidavit."

It has been repeatedly held that the question as to the bona fides of obtaining the advice of counsel, and whether a full and fair statement of the facts was made to counsel, is usually one for the jury.—2 Greenf. Ev. 459; *McLeod v. McLeod*, 73 Ala. 42. See former report of this case, 167 Ala. 146, 52 South. 596-599. So these were all clearly questions for the jury.

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We do not mean to say that there was no evidence in conflict with that quoted above; but the testimony quoted was in evidence, besides the undisputed facts which we have before stated. This, under all the authorities, was sufficient to carry the questions to the jury. For the trial court to have taken all these questions, and instructed a verdict for the defendant, would clearly have been a usurpation by the court of the functions of the jury. This case has already been tried twice, each time by a different jury, and each jury has found for the plaintiff and for substantial damages. There is nothing to show bias or prejudice against this defendant or in favor of the plaintiff. The plaintiff, who was prosecuted, was a non-resident of the state at the time of his arrest and at the time of his trial, while those who procured and instituted the prosecutions were resident citizens of the state and the county. A trial court has twice heard all the evidence, seen the witnesses, and observed their manner and demeanor; and in each instance it refused the defendant's motion to set aside the judgment. Two grand juries of Madison county have refused to indict the defendant on *ex parte* hearings of the prosecutors, and a petit jury has refused to convict him of a kindred offense of being or acting as an emigrant agent without a license. This court, on a former appeal, when the evidence was practically the same as it is now, held that the right of the plaintiff to recover was a question of fact for the jury, and reversed the case for another trial; and it would have been unusual for the trial court, on a second trial, with the evidence practically what it was before, to instruct the jury to find for the defendant, when this court had held that it should not so instruct the jury.

So the application for a rehearing on this appeal is, for all practical purposes, the second application as to

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the question of the general affirmative charge. We are therefore somewhat surprised that counsel for appellant should have been so severely shocked at the court's action, on this second appeal, in saying exactly what it had said on the former appeal. It is no doubt often hard for counsel to see the correctness of verdicts and judgments against their clients. It is likewise a natural and meritorious trait of character that counsel should feel a deep interest in the result of the suits of their clients; but it does seem that in this case, after so many trials with the same result, and after consideration of all the undisputed facts, counsel should become reconciled to its loss, without thinking that the court has failed to give it the proper attention.

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False Imprisonment.

(Decided November 28, 1911. 57 South. 29.)

1. *Municipal Corporations; Ordinances; Implied Recpal.*—Birmingham Ordinance No. 181, providing punishment for any person guilty of a misdemeanor declared to be such by the state law, which ordinance was passed in accordance with the powers conferred by the city charter under Local Acts, both of which gave the city that power, was not repealed by section 1251, Code 1907.

2. *Same; Charter.*—A change in a charter of a municipal corporation does not affect existing ordinances in harmony with the new provisions.

3. *Same; Instructions.*—The judicial inclination is to sustain the validity of ordinances, and in determining their validity, a reasonable construction will be given them.

4. *Same.*—A penal ordinance must be strictly construed.

5. *Same; Adoption by Reference.*—Municipal ordinances being construed by the same rule as statutes, an ordinance may by reference adopt the provisions of statutes or other ordinances.

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6. *Same; Validity.*—Since all persons are bound by the criminal statutes of the state, a municipal ordinance providing that any person found guilty of a misdemeanor under the state statute shall be punished therefor, is not invalid for indefiniteness and uncertainty.

7. *Same.*—Where a municipal ordinance provides that any person guilty of a misdemeanor under the state laws should be punished, the fact that there were state misdemeanor statutes inapplicable to the exercise of municipal authority, would not render the ordinance void, but it would be valid as to those misdemeanors over which the municipality had authority.

(Simpson and Sayre, JJ., dissent.)

APPEAL from Jefferson Circuit Court.

Heard before Hon. A. O. LANE.

Action by Charlie Smith against the Sloss-Sheffield Steel & Iron Company, for damages for false imprisonment. Judgment for plaintiff and defendant appeals. Reversed and remanded.

TILLMAN, BRADLEY & MORROW, for appellant. The main question in this case is whether the hirer of convicts, whose duty it is to receive the convicts, is liable for false imprisonment when he receives such convicts from a court of competent jurisdiction who regularly tries and regularly sentences them under an ordinance which was at the time treated as valid, but which was subsequently held to be invalid. We believe that the question should be answered in the negative and in support thereof, cite.—19 Cyc. 245, and authorities there cited; Cooley on Torts, (3rd ed.) 315, and authorities there cited; *Sessoms v. Botts*, 34 Tex. 335; *Hinkey v. McCord*, 55 Ia. 378; *Hallock v. Dominick*, 69 N. Y. 238; 13 Wall. 351; 86 Mich. 576; 99 Wis. 652; 16 S. C. 445; 157 Ind. 172; 24 Am. St. Rep. 140. It has been often held that the complaining witness is exempt from liability though the statute or ordinance be subsequently declared unconstitutional.—70 L. R. A. 464; 46 L. R. A. 215; 52 N. W. 904; 69 N. Y. 238. It cannot be doubted that the city of Birmingham had the authority to pass the ordi-

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nance and that the judge who tried the case had general jurisdiction over municipal ordinances. Plaintiff was charged with the same knowledge of its invalidity as was the defendant, and should have tested its validity, and it can be said then that his imprisonment was voluntary.—*Allcn v. Shedd*, 10 Cush. 375; 22 Ore. 164; 4 Johns 32; 70 L. R. A. 456; 7 Gray. 55. Under no circumstances were punitive damages recoverable.—25 W. Va. 139; 51 Pa. St. 191.

W. H. SMITH, and WILLIAM VAUGHAN, for appellee. The court had no jurisdiction of the subject matter. All the proceedings were absolutely void, and hence, defendant was a trespasser.—*Duckworth v. Johnson*, 7 Ala. 578. Consent could not confer jurisdiction.—*Root v. Eslava*, 17 Ala. 430. The defendant was required to justify the imprisonment and it cannot seek protection behind a void process or a void conviction.—19 Cyc. 345; *Oates v. Bullock*, 136 Ala. 537; *Noles v. The State*, 24 Ala. 672; *Craig v. Burnett*, 32 Ala. 728; *Withers v. Coyles*, 36 Ala. 329; *Woodall v. McMillan*, 38 Ala. 622. A void act is neither a law nor a command.—*Hopkins v. Clemson College*, U. S. Sup. Ct. in MSS. Every man is his own constitutionalist.—*Norwood v. Goldsmith*, 168 Ala. 234.

MCCLELLAN, J.—Action for damages for false imprisonment.

The bill of exceptions recites that the following ordinance of the city of Birmingham, under which the plaintiff was tried and convicted, "was regularly adopted and promulgated and in force and effect at and before the time of plaintiff's arrest and conviction": "Ordinance 181.—Be it ordained by the city council of Birmingham, that section 805 of the City Code of Birming-

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ham be and the same is hereby amended so as to read as follows: Section 805: Violation of State Laws an Offense. Any person or persons committing an offense in the city of Birmingham, which is declared by any law or laws of the state of Alabama heretofore or hereafter enacted to be a misdemeanor, shall, upon conviction, be punished as provided in section 806 of the City Code of Birmingham.

In the act entitled "An act to establish a new charter for the city of Birmingham," approved December 12, 1890 (Acts 1890-91, pp. 114, 134), it was provided "that the said mayor and aldermen shall have full power and authority, * * * 2d. To punish all offenses against the peace, good order, morals, health or sanitation of the city, * * * *and to punish any act which is by law a crime or misdemeanor against the state.*" (Italics supplied.) A similar provision to that italicized was contained in the charter of that city, approved February 23, 1899 (Local Acts 1890-99, pp. 1413, 1414, subd. 23), except that the words "a crime" were omitted. See Weakley's Local Laws, Jefferson County, p. 164, subd. 23. The ordinance under which plaintiff was convicted is practically identical in terms with the italicized charter provision.

Two questions, then, arise: First, has the ordinance been annulled by subsequent (to the charter of 1899) legislation; second, if not, is it void for uncertainty, indefiniteness?

The only legislation, of which we are aware, that could possibly effect the repeal (and that by implication only) of the italicized charter provision is the Municipal Code.—Acts 1907, p. 790 et seq. See Pol. Code, c. 32. That enactment purports, on its face (section 200) to repeal only those "laws and parts of laws, both general and special, in conflict" therewith. In

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section 80 (Pol. Code, 1251), general powers to adopt ordinances, not inconsistent with state laws, are given municipalities. Otherwise there are no provisions of the Municipal Code we can discover that affect the inquiry first stated. Obviously there is nothing in the section mentioned wherewith the italicized provision of the earlier charter is in conflict. Hence there was no repeal of the earlier charter power to punish all acts condemned by misdemeanor statutes. Besides, it is well settled that changes in municipal charters do "not affect existing ordinances in harmony with new provisions."—*Ventress v. Town of Clayton*, 165 Ala. 349, 51 South. 763; *Ferrell v. City of Opelika*, 144 Ala. 135, 39 South. 249; 1 Dillon on Munic. Corp. (5th Ed.) 233. This ordinance is within the rule.

Is the ordinance void for uncertainty, indefiniteness? In determining the validity of ordinances, a reasonable construction will be given them; the judicial inclination being to sustain, rather than overthrow, them.—2 Dillon's Munic. Corp. (5th Ed.) § 646; *Orme v. Tuscaloosa*, 150 Ala. 520, 43 South. 584. "Ordinances must, by fair and natural construction, be certain to a common intent."—28 Cyc. p. 354. "Common intent" is defined as "the natural sense given to words."—1 Bouv. Law Dict.; Black's Law Dict.

Where an ordinance is penal, as here, it must be strictly construed in determining whether the act charged is within the prohibition of the ordinance, not merely within its spirit.—*City Council of Montgomery v. L. & N. R. R. Co.*, 84 Ala. 127, 132, 4 South. 623. "The purpose of the rule (i e., of strict construction of penal statutes) is to prevent acts from being brought within the scope of punishment, because courts may suppose they fall within the spirit of the law, though not within its terms."—See also, Endl. on Interp. of Stat-

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utes, § 329, p. 454; 2 Lewis, Suth. St. Const. §§ 520-527, and notes thereto.

The ordinance under consideration would constitute municipal offenses of the violation of the misdemeanor statutes of the state. Of its purpose, there could be no doubt. In its form this ordinance falls within the category called, in respect of statutes, "reference statutes." It refers with absolute certainty to the misdemeanor statutes of the state. BRICKELL, C. J., in *Phoenix Assurance Co. v. Fire Dept. of Montgomery*, 117 Ala. 631, 23 South. 843, 42 L. R. A. 468, said that such enactments were "statutes which refer to and by reference adopt, wholly or partially, pre-existing statutes. In the construction of such statutes, the statute referred to is treated and considered as if it were incorporated into and formed part of that which makes the reference."—*Ex parte Greene & Graham*, 29 Ala. 52; Lewis, Suth. on Stat. Const. §§ 405-407; Endl. on Int. Stat. § 493; *Matthews v. Sands*, 29 Ala. 136; *Hooper v. Bankhead*, 171 Ala. 629, 54 South. 549, 552; *Beason v. Shaw*, 148 Ala. 544, 42 South. 611, 18 L. R. A. (N. S.) 566. A reference statute may adopt the law generally which governs a particular subject.—Lewis, Suth. § 405, p. 789; *Culver v. People*, 161 Ill. 89, 97, 43 N. E. 812; *Gaston v. Lamkin*, 115 Mo. 20, 33, 34, 21 S. W. 1100; *Cole v. Wayne, Judge*, 106 Mich. 692, 64 N. W. 741; other authorities, *supra*. Municipal ordinances are construed by the same rules as are statutes.—*Harbor Master, etc., v. Southerland*, 7 Ala. 511; 28 Cyc. pp. 388, 389, and notes thereon. No reason appears why ordinances and by-laws may not avail of the principles, whereby *reference statutes* are construed and given effect, provided, of course, the municipality has the power to ordain as undertaken.

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The argument, as respects its indefiniteness and uncertainty, against the ordinance necessarily is that the *reference* to the state's misdemeanor statutes is too broad; that is, brings in too comprehensive a list of laws, whereby the conduct of individuals is to be affected. If the misdemeanor statutes referred to in the ordinance were those of another sovereignty than the *parent* of the municipality promulgating this ordinance, there might be force in the suggestion. But, since the very statutes to which the ordinance refers apply and control, as by direct state authority, the conduct of every person upon whom the ordinance could have an influence or operate an effect, and since the familiar presumption against ignorance of law imposes upon every person in the jurisdiction of the municipality of Birmingham the binding quality, as upon presumed knowledge, of the misdemeanor statutes to which the ordinance definitely refers, it is evident that no injustice, from ignorance of the substance of the ordinance—the conduct it would affect—could result to any person within that jurisdiction. To so affirm would impute ignorance of the commands of the ordinance, because the misdemeanor statutes of the state were *not set out therein*; whereas, by irrefutable presumption, perfect knowledge of those statutes, in force as the law of the state, was imputed to every person permanently or temporarily within the jurisdiction of the municipality. What the misdemeanor statutes of the state were or are could not be a matter of doubt. They are *enacted* to employ the term in the ordinance, by the lawmaking powers of the state. They are written. They were or are *law* in the same jurisdiction in which the ordinance operated. Reference to them, in the ordinance, brought into the ordinance as definite a system of law, enacted by the *parent* of the ordaining authority, as was pos-

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sible, without specifying, *eo nomine*, the particular enactments to which the ordinance had reference.

If it be assumed that there were or are state misdemeanor statutes inapplicable or inappropriate to the exercise of municipal authority, this condition would not lead to the *invalidity* of this ordinance. "The fact that an ordinance covers matters which the city has no power to control is no reason why it should not be enforced as to those which it may control."—*City Council, etc., v. Shaddox*, 138 Ala. 263, 266, 36 South. 369; *Ex parte Cowart*, 92 Ala. 94, 9 South. 225; *Kettering v. Jacksonville*, 50 Ill. 39; *Ex parte Byrd*, 84 Ala. 17, 4 South. 397, 5 Am. St. Rep. 328. "An ordinance, like a statute, may be valid in some of its provisions and invalid as to others."—*Ex parte Byrd, supra*; *Ex parte Cowart, supra*, and authorities therein cited; *City Council, etc., v. Shaddox, supra*. We therefore conclude that the ordinance first quoted before is not invalid.

The recent decision delivered in *Kreulhaus' Appeal*, 164 Ala. 623, 51 South. 297, 26 L. R. A. (N. S.) 492, involved an ordinance different in terms from that here considered; and, also, no account was taken of the italicized charter provision before quoted.

The survival of the plaintiff's cause of action, as here pleaded, was and is dependent upon the invalidity of the ordinance in question. Our conclusion is opposed to the plaintiff's contention. It was valid. Accordingly the affirmative charge requested by the defendant was erroneously refused.

The judgment is reversed and the cause is remanded.
Reversed and remanded.

ANDERSON, MAYFIELD, and SOMERVILLE, JJ., concur.
SIMPSON and SAYRE, JJ., dissent. DOWDELL, C. J., not sitting.

[*Broom v. Douglass, et al.*]**Broom v. Douglass, et al.***Trespass to Person.*

(Decided February 15, 1912. 57 South. 800.)

1. *Judges; Official Acts; Liability.*—The judge of a court of general jurisdiction is not liable for any judicial act in excess of his jurisdiction, which involves an affirmative decision of the fact of jurisdiction, though the decision is erroneous, and though he acts maliciously; the rule is different where there is a clear absence of all jurisdiction.

2. *Same; Civil Liability.*—The judge of a court of limited jurisdiction is liable civilly when he acts without a general jurisdiction of the subject matter, although his act involves a decision that he has such jurisdiction, made in good faith.

3. *Same.*—A judge of an inferior court who acts fully within his jurisdiction of the subject matter, and who has acquired jurisdiction of the person in a particular case, is not liable civilly, notwithstanding he acts maliciously and corruptly.

4. *Same.*—Where a judge of an inferior court acts judicially as to a subject matter of which he has general jurisdiction, but in the particular case, has not acquired jurisdiction of the person affected, he is not liable civilly where the act involves an affirmative decision that he has jurisdiction of the person and authority to proceed, provided a colorable case has been presented to him, calling for the exercise of judgment and he had determined in good faith that the case called for the exercise of general jurisdiction.

5. *Same; Question for Court.*—Whether a judge of an inferior court had colorable cause for action so as to be relieved of civil liability, is a question of law.

6. *Same; Question for Jury.*—The question of good faith, malice or corruption on the part of a judge of an inferior court having only colorable cause for acting, is one ordinarily for the decision of the jury in determining the question of his civil liability.

7. *Courts; Jurisdiction; Excess.*—Excess of jurisdiction as distinguished from want of jurisdiction means that an act is unauthorized and void with respect to a particular case, though within the general power of the court, because the condition which alone authorize the exercise of his general power in the case, are wanting.

8. *Same; Colorable Cause.*—Colorable cause or colorable invocation of jurisdiction, when applied to the jurisdiction of an inferior court, means that some person apparently qualified to do so, has appeared before the judge and made complaint under oath, stating some facts which may, with other facts unstated, constitute a criminal offense, or stated some fact, which bears some general similitude to a fact designated by law as an offense, calling on the judge to pass on the sufficiency of the affidavit to elicit the process issued.

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9. *False Imprisonment; Civil Liability; Justice of the Peace*.—A justice of the peace acts judicially and is not civilly liable, who in good faith issues a warrant for an arrest on an affidavit of a third person, averring that accused threatened to trespass on and occupy land of which affiant has been in possession under claim of ownership, and who in good faith, after a hearing commits accused to jail unless he gives bond to keep the peace, although the affidavit was wholly insufficient to charge any criminal offense.

10. *Same; Burden of Proof*.—One who sues a justice of the peace for damages for issuing a warrant on an affidavit not charging any criminal offense has the burden of proving want of good faith.

(Mayfield, J., dissents.)

APPEAL from Morgan Circuit Court.

Heard before Hon. D. W. SPEAKE.

Action by Henry Broom against W. H. Douglass, a justice of the peace, and others, for trespass to the person by false imprisonment. Judgment for defendants, and plaintiff appeals. Affirmed.

KYLE & HUTSON, for appellant. As to what is jurisdiction see *Lamar v. Gunter*, 39 Ala. 338; *Drake v. State*, 68 Ala. 512; *Woodruff v. Stewart*, 63 Ala. 211; *Wilson v. State*, 117 Ala. 160; 1 Smith's Leading Cases, 1107; *Two Rivers Mfg. Co. v. Byers*, 17 Am. St. Rep. 143 and note. The affidavit was void and charged no offense.—*Vaughan v. Congdon*, 48 Am. Rep. 758; *Wright v. Haxon*, 24 Vt. 143. Charging no offense, it conferred no jurisdiction.—*Noles v. The State*, 24 Ala. 696; 13 Wall. 335; 10 Am. Dec. 102; 61 Am. Dec. 438; 21 Am. Dec. 217; *Johnson v. The State*, 82 Ala. 29; *Rhodes v. King*, 52 Ala. 275. Being void, it has no legal effect, and all proceedings founded on it were worthless.—Authorities supra; *Brazzleton v. The State*, 66 Ala. 96; 58 Am. St. Rep. 816. It is conceded, that if Douglass as J. P. had jurisdiction of the case against plaintiff, then his acts in the premises would be *judicial*, and he and his bondsman would not be liable for any errors of judgment committed by him; and this is

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true, even though he acted with malice, revenge or other improper motive.—*Woodruff v. Stewart*, 63 Ala. 206; *Coleman v. Roberts*, 113 Ala. 323; 19 Cyc. 333 and note. But the converse of the above proposition is also true. That is, if Douglass acted without jurisdiction as J. P. in issuing the writ, he and his bondsmen are liable.—*Sasnatt v. Weathers*, 21 Ala. 674; *Withers v. Coyles*, 36 Ala. 328-329; 19 Cyc. 336 and note 29; *Tryon v. Pingree*, note 67 Amer. St. Rep. 423 and 424; *Duckworth v. Johnston*, 7 Ala. 581.

WERT & LYNNE, and CALLAHAN & HARRIS, for appellee. Under the evidence in this case, the act was judicial under colorable cause, and the defendant was not liable.—*Bradley v. Fisher*, 13 Wall. 352; *Irion v. Lewis*, 56 Ala. 195; *Busteed v. Parsons*, 54 Ala. 402. It does not follow as a matter of course that the magistrate is liable if the process is void.—*Craig v. Burnett*, 32 Ala. 734, and authorities supra.

SOMERVILLE, J.—Appellant sued appellee in trespass for a false imprisonment, done under color of appellee's official authority as a justice of the peace.

Defendant's plea No. 2 set up an alleged justification, and showed that one Johnson appeared before him (defendant) while he was acting as a justice of the peace, and made affidavit "that Henry Broom [the plaintiff here] has threatened to trespass upon and occupy a certain parcel of land situated in this county, and known as the Dick Mitchell or Dick Bouldin place, of which affiant has the past two or three years been in possession under claim of ownership;" that on this affidavit the justice issued a warrant of arrest for said Broom; that Broom was arrested on this warrant and brought before the justice; that on the hearing of the cause the justice

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adjudged that said Broom should be committed to the county jail for 12 months, unless he gave a bond to keep the peace; and that in doing these things he (defendant) was acting judicially. Plaintiff demurred to this plea on the grounds substantially (1) that the affidavit conferred on the justice no jurisdiction to issue the warrant; and (2) that the affidavit did not charge that any criminal offense had been committed or threatened. The trial court overruled the demurrer, and this action is assigned as error.

Conceding, as we must, that the affidavit shown did not charge that Broom had threatened or was, about to commit, "an offense on the person or property of another," the threat shown being, if executed, only a civil wrong, and that the warrant of arrest was for this reason void, the question to be determined is: Is a judge of inferior and limited jurisdiction liable in trespass when, acting within his general jurisdiction of the subject-matter, but without conformity to the preliminary requirements which alone give him jurisdiction of the person and authorize him to proceed to exercise his general jurisdiction in the particular case, he issues process actually void, under which such person is unlawfully taken and restrained of his liberty? The answer, we think, will depend upon a consideration to be stated hereafter.

The general question above mooted has been the subject of much discussion by courts and text-writers, and the books exhibit great diversity of opinion as to its proper solution. It involves and draws into sharp conflict two fundamental and equally cherished principles of our legal system—the inviolability of personal liberty, except under the strictest forms of law, on the one hand, and the dignity and independence of the judiciary, on the other. It is complicated, also, by much

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confusion of thought with respect to the theory of jurisdiction in its two-fold aspect of subject-matter and person.

We need hardly say that the question is not merely whether the injurious process is irregular or utterly void, but, primarily, it is whether, on principles of sound public policy, the judge should be held liable for his action as a judge. Whether or not an executive officer would be liable for the execution of the process is an altogether different question, and is unaffected by the decisive considerations of policy here involved. These considerations have been so often and so well stated that anything more than a brief recapitulation of settled conclusions is now unnecessary.

We deduce from approved authorities the following principles as pertinent to the present case:

(1) The judge of a court of superior or general jurisdiction is not liable for any judicial act in excess of his jurisdiction which involves a present or previous affirmative decision of the fact of his jurisdiction, even though such decision is wholly erroneous, provided there is not a clear absence of all jurisdiction.—*Busteed v. Parsons*, 54 Ala. 393, 25 Am. Rep. 688; *Bradley v. Fisher*, 13 Wall. 335, 20 L. Ed. 646 (leading case); *Yates v. Lansing*, 9 Johns. (N. Y.) 395, 6 Am. Dec. 290; *Lange v. Benedict*, 73 N. Y. 12, 29 Am. Rep. 80.

(2) The fact that such judge acts maliciously or corruptly in such cases does not render him liable.—*Busteed v. Parsons*; *Bradley v. Fisher*, *supra*; 19 Cyc. 333; note to *Lacey v. Hendricks*, 137 Am. St. Rep. 47.

(3) A fortiori, the judge of a court of inferior or limited jurisdiction is liable when he acts without a general jurisdiction of the subject-matter, even though his act involves his decision, made in perfect good faith, that he has such jurisdiction.

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(4) When such judge acts fully within his jurisdiction, i. e., when he has jurisdiction of the subject-matter, and has also acquired jurisdiction of the person in the particular case, he is not liable, though he act both maliciously and corruptly.—*Irion v. Lewis*, 56 Ala. 190; *Heard v. Harris*, 68 Ala. 43; *Coleman v. Roberts*, 113 Ala. 323, 21 South. 449, 36 L. R. A. 84, 59 Am. St. Rep. 111; *Woodruff v. Stewart*, 63 Ala. 206; *Lacey v. Hendricks*, 164 Ala. 280, 51 South. 157, 137 Am. St. Rep. 45.

(5) When such judge acts judicially with respect to a subject-matter of which he has a general jurisdiction, but in the particular case he has acquired no jurisdiction of the person affected, he is not liable if the act involves his present or previous affirmative decision that he has jurisdiction of such person and authority to proceed in the particular case, provided (1) a colorable case has been presented to him which fairly calls for or permits the exercise of his judgment with respect thereto; and provided (2) he has determined in good faith, without malice or corruption, that the case presented calls for the exercise of his general jurisdiction.—*Grove v. Van Duyn*, 44 N. J. Law, 654, 43 Am. Rep. 412 (leading case); *Rush v. Buckley*, 100 Me. 322, 61 Atl. 774, 70 L. R. A. 464, 4 Ann. Cas. 318; *McCall v. Cohen*, 16 S. C. 445, 42 Am. Rep. 641; *Bell v. McKinney*, 63 Miss. 187; *Gardner v. Couch*, 137 Mich. 358, 100 N. W. 673, 109 Am. St. Rep. 684; *Smith v. Jones*, 16 S. D. 337, 92 N. W. 1084; *Thompson v. Jackson*, 93 Iowa, 376, 61 N. W. 1004, 27 L. R. A. 92; *Robertson v. Parker*, 99 Wis. 652, 75 N. W. 423, 67 Am. St. Rep. 889; *Calhoun v. Little*, 106 Ga. 336, 32 S. E. 86, 43 L. R. A. 630, 71 Am. St. Rep. 254; *Stewart v. Hawley*, 21 Wend. (N. Y.) 552; *Landt v. Hilts*, 19 Barb. (N. Y.) 283; *Ayers v. Russell*, 50 Hun, 382, 3 N. Y. Supp. 338; *Bocock v.*

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Cochran, 32 Hun (N. Y.) 523; *Harman v. Brotherson*, 1 Denio (N. Y.) 537; *Gillett v. Thiebald*, 9 Kan. 427.

We, of course, do not affirm that all of these cases have elaborated the principle in precise terms. Some of them have, and others clearly illustrate its operation.

There are numerous cases which support the view that a judge of limited and inferior jurisdiction is liable in every case where he acts merely in excess of his actual jurisdiction, so that his act is void, as distinguished from voidable or irregular.—*Bigelow v. Stearns*, 19 Johns. (N. Y.) 39, 10 Am. Dec. 189; *Yates v. Lansing*, 9 Johns. (N. Y.) 395, 6 Am. Dec. 290; *Gru-man v. Raymond*, 1 Conn. 40, 6 Am. Dec. 200; *De Cour-cery v. Cox*, 94 Cal. 665, 30 Pac. 95; and many other cases cited in notes to *Rush v. Buckley*, 4 Ann. Cas. 325-332; *Tryon v. Pingree*, 67 Am. St. Rep. 423; and *Austin v. Vrooman*, 14 L. R. A. 138.

These cases, however, proceed in general on the narrow view that a void act necessarily imposes liability, which assumes, in accordance with a once much favored theory, that there is a radical distinction between the acts of judges of high and judges of low degree in excess of their jurisdiction, to the extent that the one class should never be held liable, while the other should always be. That there is in reason, justice, or policy any such radical distinction has long been subject to doubt, and is increasingly denied by the best-considered modern cases and by standard text-writers.—*Rush v. Buck-ley*, 100 Me. 322, 61 Atl. 774, 70 L. R. A. 464, 4 Ann. Cas. 318; *Thompson v. Jackson*, 93 Iowa, 376, 61 N. W. 1004, 27 L. R. A. 92, and editorial note; *Calhoun v. Lit-tle*, 106 Ga. 336, 32 S. E. 86, 43 L. R. A. 630, 71 Am. St. Rep. 254; Bishop's Noncontract Law, § 783; Throop on Public Officers, § 720; 1 Jaggard on Torts, 122. And there can be no doubt, we think, but that the distinction

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is sufficiently emphasized and public policy fully subserved by the requirement of good faith, without malice or corruption, with at least a colorable invocation of the judicial function in the particular case.

Our views upon this subject are so fully and satisfactorily stated by Beasley, C. J., in *Grove v. Van Duyn*, 44 N. J. Law, 654, 43 Am. Rep. 412, that we adopt his language as a part of this opinion. He said, in part:

"It is said everywhere in the text-books and decisions that the officer, in order to entitle himself to claim the immunity that belongs to judicial conduct, must restrict his action within the bounds of his jurisdiction, and jurisdiction has been defined to be 'the authority of law to act officially in the particular matter at hand.' —Cooley on Torts, 417. But these maxims, although true in a general way, are not sufficiently broad to embrace the principle of immunity that appertains to a court or judge exercising a general authority. Their defect is that they leave out of the account all those cases in which the officer in the discharge of his public duty is bound to decide whether or not the particular case, under the circumstances as presented to him, is within his jurisdiction, and he falls into error in arriving at his conclusion. In such instance, the judge, in point of fact and law, has no jurisdiction, according to the definition just given, over 'the particular matter in hand,' and yet, in my opinion, very plainly he is not responsible for the results that wait upon his mistake. And it is upon this precise point that we find confusion in the decisions. There are certainly cases which hold that if a magistrate, in the regular discharge of his functions, causes an arrest to be made under his warrant on a complaint which does not contain the charge of a crime cognizable by him he is answerable in an action for the injury that has ensued. But I think

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these cases are deflections from the correct rule; they make no allowance for matters of doubt and difficulty. If the facts presented for the decision of the justice are of uncertain signification with respect to their legal effect, and he decided one way, and exercises a cognizance over the case, if the superior court, in which the question arises in a suit against the justice differs with him on this close legal question, is he open, by reason of his error, to an attack by action? If the officer's exemption from liability is to depend on the question whether he had jurisdiction over the particular case, it is clear that such officer is often liable under such conditions, because the higher court, in deciding a doubtful point of law, may have declared that some element was wanting in the complaint which was essential to bring this case within the judicial competency of the magistrate. But there are many decisions which, perhaps, without defining any very clear rule on the subject, have maintained that the judicial officer was not liable under such conditions. The very copious brief of the counsel of the defendants abounds in such illustrations. * * *

"These decisions, in my estimation, stand upon a proper footing, and many others of the same kind might be referred to; but such course is not called for, as it must be admitted that there is much contrariety of results in this field, and the references above given are amply sufficient as illustrations for my present purposes. The assertion, I think, may be safely made that the great weight of judicial opinion is in opposition to the theory that if a judge, as a matter of law and fact, has not jurisdiction over the particular case that thereby, in all cases, he incurs the liability to be sued by any one injuriously affected by his assumption of cognizance over it. The doctrine that an officer having general pow-

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ers of judicature must, at his peril, pass upon the question, which is often one difficult of solution, whether the facts before him place the given case under his cognizance, is as unreasonable as it is impolitic. Such a regulation would be applicable alike to all courts and to all judicial officers acting under a general authority, and it would thus involve in its liabilities all tribunals, except those of last resort. It would also subject to suit persons participating in the execution of orders and judgments rendered in the absence of a real ground of jurisdiction. By force of such a rule, if the Supreme Court of this state, upon a writ being served in a certain manner, should declare that it acquired jurisdiction over the defendant, and judgment should be entered by default against him, and if, upon error brought, this court should reverse such judgment on the ground that the service of the writ in question did not give the inferior court jurisdiction in the case, no reason can be assigned why the justices of the Supreme Court should not be liable to suit for any injurious consequences to the defendant proceeding from their judgment. As I have said in my judgment, the jurisdictional test of the measure of judicial responsibility must be rejected.

“Nevertheless it must be conceded that it is also plain that in many cases a transgression of the boundaries of his jurisdiction by a judge will impose upon him a liability to an action in favor of the person who has been injured by such excess. If a magistrate should, of his own motion, without oath or complaint being made to him, on mere hearsay, issue a warrant and cause an arrest for an alleged larceny, it cannot be doubted that the person so illegally imprisoned could seek redress by a suit against such officer. It would be no legal answer for the magistrate to assert that he had a general

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cognizance over criminal offenses; for the conclusive reply would be that this particular case was not, by any form of proceeding, put under his authority.

"From these legal conditions of the subject, my inference is that the true general rule with respect to the actionable responsibility of a judicial officer having the right to exercise general powers is that he is so responsible in any given case belonging to a class over which he has cognizance, unless such case is by complaint or other proceeding put at *least colorably* under his jurisdiction. Where the judge is called upon by the facts before him to decide whether his authority extends over the matter, such an act is a judicial act, and such officer is not liable in a suit to the person affected by his decision, whether such decision be right or wrong. But when no facts are present, or only such facts as have neither legal value nor color of legal value in the affair, then, in that event, for the magistrate to take jurisdiction is not, in any manner, the performance of a judicial act, but simply the commission of an unofficial wrong. This criterion seems a reasonable one; it protects a judge against the consequences of every error of judgment, but it leaves him answerable for the commission of wrong that is practically willful; such protection is necessary to the independence and usefulness of the judicial officer, and such responsibility is important to guard the citizen against official oppression.

"The application of the above-stated rule to this case must obviously result in a judgment affirming the decision of the circuit judge. There was a complaint, under oath, before this justice, presenting for his consideration a set of facts to which it became his duty to apply the law. The essential things there stated were that the plaintiff, in combination with two other persons, entered upon certain lands, and 'with force and arms

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did unlawfully carry away about four hundred bundles of cornstalks, of the value,' etc., and were engaged in carrying other cornstalks from said lands. By a statute of this state (Rev. p. 244, § 99), it is declared to be an indictable offense 'if any person shall willfully, unlawfully and maliciously' set fire to or burn, *carry off*, or destroy any barrack, cock, crib, rick or stack of hay, corn, wheat, rye, barley, oats, or grain of any kind, or any trees, herbage, growing grass, hay or other vegetables, etc. Now, although the misconduct described in the complaint is not the misconduct described in this act, nevertheless the question of their identity was *colorably* before the magistrate, and it was his duty to decide it; and under the rule above formulated he is not answerable to the person injured for his erroneous application of the law to the case that was before him."

By "excess of jurisdiction," as distinguished from the entire absence of jurisdiction, we understand and mean that the act, though within the general power of the judge, is not authorized, and therefore void, with respect to the particular case because the conditions which alone authorize the exercise of his general power in that particular case are wanting; and hence the judicial power is not in fact lawfully invoked.

By a "colorable cause," or a "colorable invocation of jurisdiction," as applied to cases like the instant one, we understand and mean that some person, apparently qualified to do so, has appeared before the justice and made complaint under oath and in writing, stating at least some fact or facts which enter into and may, under some condition, or in co-operation with some other unstated fact or facts, constitute a criminal offense, or stating some fact or facts which bear some general similitude to a fact or facts designated by law as constituting an offense; in either case, calling upon the justice

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to pass upon their sufficiency to elicit the process issued.

A less general definition is not practicable, even were it expedient, and what we have said will serve to illustrate the general scope of this requirement. Whether it is met is, of course, a question of law for the court; while the issue of good faith, malice, or corruption is ordinarily for the jury to determine. We have examined all the decisions of this court upon the general question under consideration, and, with a single exception, find none in conflict with the rule we now adopt.

In *Duckworth v. Johnston*, 7 Ala. 581, the warrant was held void, because the affidavit charged no offense. The justice was not sued, and the only conclusion was that the *officer* who executed it, and the *party* who caused it to be issued, were liable in trespass. To the same effect, is *Crumpton v. Newman*, 12 Ala. 199, 46 Am. Dec. 251.

In *Sasnatt v. Weathers*, 21 Ala. 674, the suit was in trespass against the justice and the constable. The justice had rendered a judgment for costs against the plaintiff in preliminary proceedings for a felony, which he had absolutely no authority to do in any phase of the case. On this void judgment, he issued an execution—a purely *ministerial act*. The writ was held void, and the justice was held liable for issuing it and the constable for executing it. The question of liability for *judicial* action was not presented.

In *Withers v. Coyles*, 36 Ala. 320, the mayor of Mobile was held liable for trespass to a slave whom he had imprisoned under an ordinance “for the punishment of vagrants and disorderly persons;” this court holding that the ordinance was applicable only to *free* persons, and not to *slaves*, although the word “persons” sometimes included slaves. Inasmuch as the magistrate was called upon to construe the ordinance as to its proper

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application to persons, and his decision of the question was a judicial act with a *colorable* foundation, we think the conclusion that he was liable for his erroneous construction of the language of the ordinance was not justified on principle, and is not supported by any authority. We are therefore unwilling to follow this decision.

In *Craig v. Burnett*, 32 Ala. 728, the members of the town council of Cahaba were ex officio justices of the peace. Sitting as a *town council*, and *not as magistrates*, they convicted the plaintiff of an offense within their jurisdiction as magistrates, and ordered him to be imprisoned in default of payment of the fine. This judgment was, of course, fundamentally void, as was also the town clerk's warrant of arrest. Under this pseudo-judgment, the mayor committed plaintiff to the custody of the town marshal, and he sued mayor, clerk, and marshal for the false imprisonment. There was here no judicial action, and liability attached as a matter of course. Comment is unnecessary; but the language of the opinion by WALKER, J., is worthy of notice: "If it appeared that the fact, upon which the jurisdiction of the council over the matter of the imprisonment depended was *judicially* considered and adjudged by the council, then the defendants would not be liable for their mere error of judgment. Every judicial tribunal, invested with authority to be exercised in a certain contingency, has authority to inquire and ascertain whether the contingency has occurred. *Where jurisdiction depends upon the existence of a preliminary fact, there is authority to decide whether that fact exists.* A court is entitled to as full protection against an error of judgment in reference to the existence of the jurisdictional fact as in reference to the merits of the suit." (Italics ours.) It will be noted, also, that no distinction is recognized between superior and inferior judges. The

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loose, if not inaccurate, treatment of this subject in some of the early cases is well illustrated by the citation of this case in support of the conclusion reached in *Withers v. Coyles, supra*, with which it is evidently wholly inconsistent.

In *Woodall v. McMillan*, 38 Ala. 622, the action was trespass for a false imprisonment against the prosecutor for causing a justice of the peace to issue a warrant of arrest for plaintiff on an affidavit charging him with the commission of the crime of perjury at Huntsville, in a *neighboring county*. There being no jurisdiction of the *subject-matter*, the warrant was held void, and the prosecutor held liable. It would seem that the justice also would have been liable under the rule we announce.

In *Heard v. Harris*, 68 Ala. 43, the principle of the rule was expressly left undecided; BRICKELL, C. J., saying: "Whether it be true or not the personal protection the maxim [of judicial exemption] affords is confined, when the authority of an inferior jurisdictional officer, like a justice of the peace, is drawn in question, to matters within their jurisdiction, or whether he is entitled to protection because he may have erroneously adjudged he had jurisdiction, and whether, at his peril, he adjudges that question, we do not consider."

In *McLendon v. A. F. L. M. Co.*, 119 Ala. 518, 24 South. 721, a justice of the peace was held liable for falsely certifying an acknowledgment to a deed; the grantor not having made the acknowledgment, nor even appeared before the justice for the purpose. Although the certificate of acknowledgment is, under our decisions, a judicial act, it is manifest that it was here without any *color of authority*, and there was nothing to challenge his judicial action. Indeed, it was *prima facie* malicious or corrupt.

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In *Crosthwait v. Pitts*, 139 Ala. 421, 36 South. 83, the same conclusion, on the same facts, is reaffirmed.

In the recent case of *Earp v. Stephens*, 1 Ala. App. 447, 55 South. 270, a justice of the peace was held liable for issuing a writ of attachment against property *without either affidavit or bond*. Here there was nothing to provoke inquiry, and not even a colorable appeal to the authority exercised. The ruling is explained by WALKER, P. J., in perfect accord with the instant case; for he says: "It is not to be supposed that the Legislature intended that the official should have the power to direct such a summary seizure of property without even a colorable attempt to require an observance of the precautions prescribed to prevent the issuance of the writ in cases in which the law did not authorize it, and to provide the prescribed means of indemnity for an abuse of the extraordinary process."

Applying, now, the rule of liability above stated to the facts of the present case, we are of the opinion that the affidavit made before the defendant as a justice of the peace, though wholly insufficient to charge any criminal offense, or to justify the issuance of the warrant of arrest, nevertheless was clearly an attempt to charge a threatened criminal trespass on affiant's land. And, stating facts which were elements of that offense, and of legal significance and value in its proof, a colorable case was presented which fairly invoked the justice's judgment as to their sufficiency for the purpose intended. The issuance of the warrant was therefore a judicial act, involving his inquiry and affirmative conclusion as to his power and authority to do so, for which he cannot be held liable, if he acted in good faith. It follows that the special plea stated a good defense to the complaint as framed, and the demurrers were properly overruled.

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The question of good faith on the part of the defendant is not directly presented here by the pleadings; but we deem it necessary to any clear apprehension of the rule of nonliability to state, also, its essential limitations. And in this connection it is to be noted that, since the law will always *prima facie* impute good faith to judicial action, the burden is upon the plaintiff, in a case like this, to both allege and prove the want of it.

DOWDELL, C. J., and SIMPSON, ANDERSON, and SAYRE, JJ., concur. McCLELLAN, J., concurs in the conclusion.

MAYFIELD, J.—(dissenting.)—On rehearing, the majority decline to change the decision, but do change the opinion. To this changed opinion, I propose to reply.

This opinion, by my Brother SOMERVILLE, will be a splendid one when a case arises to which it can apply. It is not applicable to the case at bar, but is applicable to cases like those of *Grore v. Van Duyn*, 44 N. J. Law, 654, 43 Am. Rep. 412, and *Bradley v. Fisher*, 13 Wall. 335, 20 L. Ed. 646. I fully concur with Brother SOMERVILLE that these are leading American cases, and among the best considered, by the ablest judges, as to the civil liability of inferior judges as for their judicial actions. There is not a sentence, a line, a word, in the opinions of those two cases in which I do not concur; nor do I think that there was error in the conclusion or decision of either.

The radical and controlling difference between these cases and the one under consideration is that the former were actions which sought to hold a judge of an inferior court liable for erroneous judicial actions; while this action seeks to hold the judge liable for a void and unauthorized ministerial act. If this had been an ac-

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tion for "an erroneous or corrupt exercise by the justice of the jurisdiction the law confers," then the opinion of the majority would be applicable, and sufficient answer to the contentions of appellant; but the fact remains unanswered, and this record, and the statutes, and the decisions of this and other courts, declare that it is not such a case, and must be distinguished from such.

This distinction is clearly pointed out by BRICKELL, J., in the case of *Kelly v. Moore*, 51 Ala. 364, 365. It is there made clear that actions like that there under consideration (which was exactly like this) were brought under the statute, nor for a corrupt or erroneous exercise of jurisdiction conferred by law, but for an abuse of the authority of the office, in acts done "under color of office." In the case stated, BRICKELL, J., treating of the wrong complained of, says: "'Under color of his office,' he arrests and imprisons the plaintiff. This was a misdemeanor at common law, and a tort for which an action could have been maintained against the justice. The sureties on his official bond would not, at common law, have been liable for this tort. The malfeasance of their principal, of which misfeasance could not also be predicated, was not within the scope of their obligation.—*Governor v. Hancock*, 2 Ala. 728; *McElhaney v. Gilleland*, 30 Ala. 183. This was deemed a defect in the common law, and to cure it the statute now extends the liability of sureties on official bonds to injuries from wrongful acts done by the officer under color of his office, as well as to the nonperformance or negligent performance of official duty.—R. C. § 169."

The gravamen of the complaint in this case, to quote exactly, is as follows: "The said Douglass did, under color of his office as such justice of the peace, cause the plaintiff to be illegally arrested, by which he was de-

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prived of his liberty for a long time," etc. No complaint whatever is made of any judicial action on the part of the justice, whether erroneous or corrupt. It is a ministerial act, done under color of office, of which complaint is made; and for such the statute makes the justice and his official bondsmen liable.

It is true that the justice and the surety attempted to defend against this action by pleading that the acts of the justice were "judicial," and that therefore neither he nor the surety was liable civilly for damages consequent upon such acts. But the trouble as to this plea was that it set out the warrant issued by the justice, and under which the plaintiff was arrested and imprisoned, which warrant, as Brother SOMERVILLE very correctly holds, was void on its face. In issuing this warrant, the justice no more acted judicially than did the constable who executed it; both were equally ministerial acts, and the two officers are equally liable as for arrests made under the writ, if in fact and in law it is absolutely void.

A justice of the peace, in both civil and criminal proceedings before him, acts both judicially and ministerially; and as for his judicial acts, if within his jurisdiction or "colorably so," as stated by Justices BEASLEY and SOMERVILLE, he is not civilly liable, though the acts are both erroneous and corrupt; but as for his ministerial acts which are void and wholly unwarranted by law, he is civilly and personally liable, was so under the English common law, is so under all American common law, and, together with his official bondsmen, is in this state made liable by statute.—51 Ala. 365, 366.

A justice, in criminal proceedings, in hearing complaints, taking affidavits, examining witnesses to determine whether or not any offense has been committed, and if so, what offense, and who is probably guilty thereof, acts judicially, just as he does, on the hearing

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or the trial, when the accused is brought before him; and if the justice errs in such matters he is not civilly liable to any party injured by reason of his error, as long as he acts within his jurisdiction as justice. But when he undertakes the issuing of a warrant of arrest which commands and secures the arrest, and possibly the imprisonment, of the person charged he quoad hoc acts ministerially; and if he issues a warrant which is absolutely void on its face, or a warrant which is valid, but not authorized by law to be issued by the justice in that particular case, he is civilly liable, just as a private citizen would be if he issued such a process, and thus procured wrongful arrests and imprisonments. From such liability, the justice cannot hide beneath his judicial ermine.

The effect of our statute is to make also liable the official bondsmen of the justice for all such unlawful and unwarranted acts done "under color of office." It is the "color of office" alone that makes the bondsmen liable, and, of course, they are not liable if the principal is not so liable. "Color of office" is necessary to render the surety liable as for ministerial acts, as well as is "color of jurisdiction" to excuse the justice as for judicial acts.

The law is well stated by the Supreme Court of New York, in the case of *Blythe v. Tompkins*, 2 Abb. Prac. (N. Y.) 472: "The defendant having jurisdiction to issue warrants for the apprehension of persons for violating the provisions of the 'act to prevent intemperance, pauperism, and crime' could not be made liable in a civil action for deciding that a warrant should issue on insufficient evidence. In determining whether there was sufficient evidence to authorize the issuing of a warrant, he acted judicially; and he is not liable while thus acting, even if he erred in judgment.—*Horton v. Auch-*

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moody, 7 Wend. 200; *Tompkins v. Sands*, 8 Wend. 462 [24 Am. Dec. 46]; [*People v. Collins*] 19 Wend. 56; [*Harman v. Brothcrson*] 1 Denio, 537, 540; [*Houghton v. Swarthout*, 1 Denio] 590; *Payne v. Barnes*, 5 Barb. 467; [*Weaver v. Devendorf*] 3 Denio, 117; [*People v. Sup'r's of Chenango County*] 11 N. Y. 573. But in making the warrant and delivering it to the officer he acted ministerially.—*Rogers v. Mulliner*, 6 Wend. 597, 603 [22 Am. Dec. 546], 8 Wend. 462 [24 Am. Dec. 46]; *Van Rensalaer v. Witbeck*, 7 N. Y. 521; *Houghton v. Swarthout*, 1 Denio, 589. Where ministerial duty is violated the officer, although for most purposes a judge, is still civilly liable for such misconduct.—*Wilson v. Mayor of N. Y.*, 1 Denio, 599 [43 Am. Dec. 719]; Barb. Cr. Tr. 429, 430, and cases cited. The main question to be decided is whether the warrant is void on its face. If it is, then it will not protect the defendant, although he acted in good faith, and was authorized by the evidence before him to issue a valid warrant."

The distinction between judicial and ministerial acts, and the liability as for each, is observed by all the text-writers and in all the decisions upon the subject. See Words and Phrases, Ministerial Acts, which collects the decisions. The same distinction between the two kinds of acts of the justice, and his liability for each, has been repeatedly recognized by this court. "Justices are not liable for their judicial acts, however erroneous, and there can be no inquiry as to the motive for such acts.—*Coleman v. Roberts*, 113 Ala. 323, 21 South. 449 [36 L. R. A. 84 59 Am. St. Rep. 111]; *Heard v. Harris* 68 Ala. 43; *McLendon's Case*, 119 Ala. 518., 24 South. 721; *Irion v. Lewis*, 56 Ala. 190. But they and their sureties are liable for their wrongful ministerial acts done under color of office.—*Coleman v. Roberts, supra*; *McLendon's Case, supra*; *Kelly v. Moore*, 51 Ala. 364;

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Mason v. Crabtree, 71 Ala. 479. A justice of the peace who affixes an official certificate of acknowledgment to a deed, which is false and fraudulent, is guilty of a gross usurpation, for which he is liable on his official bond to the party injured.—*McLendon's Case, supra*. Where a justice of the peace commits a wrong under color of his office, which is a usurpation of judicial authority, he will not be protected from responsibility on his bond because he acted in a judicial capacity.—*Ib.*; *Heard v. Harris*, 68 Ala. 47; *Woodruff v. Steirart*, 63 Ala. 215.” 4 Mayfl. Dig. 2.

If the action in this case had been based solely upon a judicial act of the justice, then the opinions of the majority (original, and that on the rehearing) would be applicable, or, at least, “colorably” applicable; but the action is for an unauthorized and illegal ministerial act done “under color of office.” Hence the majority opinions are not “colorably” applicable to the case in hand.

So far as I know, but few courts or judges, during the last century, have doubted or denied the soundness of the proposition that an action will not lie against a judge for a wrongful commitment, nor for an erroneous judgment, nor for any other act performed or done by him in his “judicial capacity.” Such absolution or exemption from liability is necessary to the independence, if not to the very existence, of the judiciary, as its sole duty is to pass upon and determine the rights and liberties of the citizens, among themselves, and as between them and the state, and if judges are to be held liable for their erroneous decisions we will soon have no judges, or, if any, they will all be bankrupts. Cases involving great interests, and the liberties and even the character of prominent parties, exciting the deepest feelings and prejudices, are constantly being determined by

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the courts. In such cases, there is often great conflict in the evidence, and great doubt as to the law which should control the decision, imposing upon the judges the severest tests of labor, care, and of painstaking consciousness of responsibility. And often, in such cases, the losing party feels the keenest disappointment, and therefore the more readily looks to anything, rather than to the reasoning or the soundness of the decision against him, to explain the action of the judge or judges who decide against him. This intensified feeling of disappointment often finds vent in imputations against the character of the judges or of the court rendering the decision. This results, not always from bad motives of the judges or courts rendering the decisions, but is probably largely due to the imperfection of human nature. If an action would lie for the wrongful decision of a judge under such conditions, when the passions and prejudices of litigants are thus fired by disappointment, many litigants would not hesitate to ascribe any motive or character to the act or decision which was against them, their interest, liberty, or character, such is the frailty of human nature. For this reason, the law has seen fit to provide that judges shall not be liable for their judicial acts, though done corruptly and maliciously.

As was said by Justice Field, in *Bradley v. Fisher*, 13 Wall. 350, 20 L. Ed. 646: "In this country, the judges of the superior courts of record are only responsible to the people, or the authorities constituted by the people, from whom they receive their commissions for the manner in which they discharge the great trusts of their office. If in the existence of the powers with which they are clothed as ministers of justice, they act with partiality, or maliciously, or corruptly, or arbitrarily, or oppressively, they may be called to an account by impeachment and suspended or removed from office. In

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some states, they may be thus suspended or removed without impeachment by a vote of the two houses of the Legislature."

The only liability that attaches to an erroneous judicial act is when there is clearly no jurisdiction of the subject-matter, when, of course, an asserted authority is obviously usurped, and if the want of authority is known to the judge no excuse is permissible; but the manner in which, and the extent to which, the jurisdiction shall be exercised are questions peculiarly, if not exclusively, for the determination of the judge.

Justice Field (13 Wall. 353, 20 L. Ed. 646) quotes from the English justice, Blanc, that there is "a material distinction between a case where a party comes to an erroneous conclusion in a matter over which he has jurisdiction and a case where he acts wholly without jurisdiction;" and goes on to say that Judge Blanc "held that, where the subject-matter was within the jurisdiction of the judge, and the conclusion was erroneous, although the party should, by reason of the error, be entitled to have the conclusion set aside, and to be restored to his former rights, yet he was not entitled to claim compensation in damages for the injury done by such erroneous conclusion, as if the court had proceeded without any jurisdiction."

While the immunity from liability of judgment as for judicial acts is almost absolute, no such immunity exists as for their ministerial acts. As to such latter class of acts, judges are liable, just like all other public officers; and to protect the people against the oppression of officers statutes have been enacted requiring certain officers to execute official bonds, conditioned to pay all such damages as may result to the people or to the state if the officer shall not faithfully perform and discharge the duties of the office. Among the officers required to give

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such bonds are justices of the peace and probate judges. While they and their bondsmen are not liable as for acts which are strictly judicial, if done within their jurisdiction, they are liable as for the ministerial acts, as such, just as are sheriffs and other officers.

The distinction which I have endeavored to draw between "judicial acts" and "ministerial acts" is clearly observed by all the cases cited and relied upon by the majority. The case of *Bradley v. Fisher, supra*, which the majority say is the leading case, was based solely upon "judicial acts" by reason of the "willful, malicious, oppressive, and tyrannical acts and conduct" of a judge in depriving the plaintiff of the right to practice law; that is, in disbarring the plaintiff from such practice. The other leading case relied upon is the New Jersey case quoted from at length. While the facts in that case are very similar to those in the case at bar, it is clearly distinguishable from this upon the sole ground of judicial action and ministerial action. There was no question in that case as to the validity of the warrant of arrest, but only as to whether it was lawfully issued under the affidavit and the evidence before the justice when he issued it. The affidavit is set out in that case, but the warrant is not; but the statement of facts says that the justice thereupon "issued his warrant in the ordinary form." If the warrant in that case had been void, as it was in this, the justice would have been held liable under the opinion there.

Chief Justice BEASLEY, in the case so much relied upon and cited by the majority (44 N. J. Law, 660, 43 Am. Rep. 412), says: "If a magistrate should, of his own motion, without oath or complaint being made to him, on mere hearsay, issue a warrant and cause an arrest for an alleged larceny, it cannot be doubted that the person so illegally imprisoned could seek redress by a suit

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against such officer. It would be no legal answer for the magistrate to assert that he had a general cognizance over criminal offenses; for the conclusive reply would be that this particular case was not, by any form of proceeding, put under his authority."

So in the case at bar, if the justice had issued a proper warrant for "a trespass after warning," or for a threatened breach of the peace, then his liability, if any, would have been as for a judicial act; but the warrant he issued was absolutely void, charging no criminal offense known to God or man; and, had he taken a proper affidavit and fully examined the affiant and his witness under oath, and their evidence had shown conclusively that a dozen criminal offenses had been committed, and that the person arrested was guilty of all, this would not have warranted him in issuing a warrant void on its face, and which was intended to, and did, procure the arrest and imprisonment of this plaintiff. Suppose the affidavit or other proof before the justice should show the offense of larceny, this would not authorize the issuance of a valid warrant charging murder, and would certainly not authorize or justify the issuing of a void warrant.

But the justice in this case is in a worse condition; the affidavit he took was as void as his warrant, and he failed to examine any witness before issuing the warrant, as the statute directs, but proceeded to issue an absolutely void warrant, and now attempts to escape liability by hiding under his judicial robes as for this unwarranted and illegal ministerial act of issuing a void warrant, and then directing the sheriff or constable to arrest and imprison the plaintiff under the void process issued by him, thus depriving the plaintiff of his liberty, without due process of law, and rendering the sheriff or constable absolutely liable for obeying

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his orders and executing his process, as the law directs such executive officer to do.

What was said by the Supreme Court of New York, in *Blythe v. Tompkins*, 2 Abb. Prac. 472, is very appropriate here. The officer who issues or executes process must see that it is valid on its face, or he is liable for his acts under it. The law does not throw any protection around an officer or person who attempts to arrest by an illegal warrant.

The writ or warrant must not be deficient in the frame of it. It must at least be lawful on its face. It would be strikingly unjust to hold one officer liable for a ministerial act in executing process, but excuse the officer who issued it, who was charged with the duty and was under bond to issue it correctly. The latter is presumed to be, and should be, more competent to judge of the validity of the process which he himself issues than the former, whose duty the law makes it to execute all process issued by the latter. If the justice acted judicially in issuing the warrant, there might be some force in the reasoning of the majority opinion; but, as all the authorities, including our own, hold this act to be a ministerial one, I cannot see how the judicial immunity can protect the justice as to this act.

A justice who renders an erroneous or void judgment and sentence may not be liable therefor if the subject-matter and the party were within and under his jurisdiction; but if, in addition to that, he issues a void mittimus, committing the defendant to jail, or to the whipping post, or to be hung, as a justice once did in this state, and the mittimus should be executed, I apprehend there would be no doubt as to his liability as for this act. The same is true as for his rendering a void judgment in a civil action. He might not be liable if the judicial act was within his jurisdiction, or "colorably"

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so, if you please to so term it; but if he should thereafter issue a void execution, and the defendant's property should be sold thereunder wrongfully, I apprehend that there would be no doubt as to his liability in that instance. The issuance of a warrant upon affidavit or other ex parte judicial examination as to probability of guilt, is as much a ministerial act as is the issuance of an execution or mittimus after trial and judgment.

It was the warrant that caused the arrest and imprisonment of the plaintiff in this case, not the void affidavit, nor the failure to examine affiant or other witnesses before its issuance, or before any erroneous judicial judgment. If the warrant was void, as the court holds it was, it could not be cured because there was a sufficient affidavit or preliminary proof, and, if so, certainly it was not cured because there was a void affidavit and no preliminary examination of witnesses, as the statute contemplates and provides for.

To my mind, the only plausible theory upon which the decision and conclusion of the majority can rest is upon one thus far not suggested, though two opinions have thus far been written. That plausible theory is that the affidavit and warrant are not void, but valid, or at worst merely irregular or voidable only; but the trouble with this theory is that it runs counter to both the facts and the record in this case, as well as to scores of decisions of this court, and to hundreds, if not to thousands, of those of other courts. Many of these are cited in the opinion of Justice SOMERVILLE, and many in the brief of the appellant. I will cite here only a few, in which others are cited, showing beyond doubt that both the affidavit and the warrant are absolutely void for all or any purposes:—*Duckworth v. Johnston*, 7 Ala. 578; *Crumpton v. Newman*, 12 Ala. 199, 46 Am. Dec. 251; *Miles v. State*, 94 Ala. 106, 11 South. 403;

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Johnson v. State, 82 Ala. 29, 2 South. 466; *Monroe v. State*, 137 Ala. 88, 34 South. 382; *Butler v. State*, 130 Ala. 127, 30 South. 338.

Any doubt that I might otherwise have upon the questions whether or not this warrant was void on its face, and whether this court should now decide the inquiry affirmatively and reverse the case, is removed by what CHILTON, C. J., said of a warrant which much more nearly approached validity, or was much more "colorable" of jurisdiction, than this one. In that case, the great Chief Justice said: "Is the warrant in this case void upon its face? Does it show, upon its face, that the justice had no jurisdiction of the complaint, the substance of which the law requires should be stated in it?—Code, § 3341. Upon our first examination, we thought it was not void, but informal merely. Upon having our attention more particularly called to it by the counsel for the prisoner, we are fully satisfied that our first impression was wrong, and that it is wholly void. * * * The warrant in this case appears, upon its face, to be predicated upon the affidavit of Mary Noles, wife of the prisoner, which merely states that she 'is afraid that her husband, Joseph Noles, of said county, laborer, will beat, wound, maim or kill her, or do her some bodily hurt.' It sets forth no other cause of complaint, than in the recital of this oath, and proceeds 'these are therefore to command you,' etc. This statute, being in restraint of liberty and penal, must be strictly construed; that is, it may not be enlarged, by construction, beyond the plain import of the terms in which it is couched. We are aware that this looks like a technical ground upon which to reverse a cause of this grave importance; but it is our duty to decide the law, irrespective of consequences, and being satisfied that the warrant is void we have no alterra-

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tive but to reverse the sentence and remand the cause, that the prisoner may be again tried."—*Noles v. State*, 24 Ala. 696, 697.

To recapitulate: The error of the majority is that they treat the case as if the act of the justice complained of was a judicial one, when clearly it was a ministerial one. It was not the taking of the void affidavit that injured and damaged plaintiff, and it was not of that he complained. It was issuing the void warrant and placing it in the hands of the executive officer by the judicial officer, which caused plaintiff's arrest and incarceration. This was ministerial and not judicial, though done by a judge or justice of the peace. If a sufficient affidavit would not have saved him from liability as for this wrongful and void ministerial act, then certainly a void though colorable one could not. If the only wrong here complained of had been a judicial act, I would not contend that this justice was civilly liable; nor do I understand that plaintiff's counsel has ever so contended. It is liability for a void ministerial act that is sought to be enforced, that is given by statute; and I do not think that the court ought to thus take it away.

Justices of the peace and their sureties are not the only officers or parties the statute makes liable; but it extends the liability to other judges, and has been enforced by this court even against probate judges. In the case of *Grider v. Tally*, 77 Ala. 422, 54 Am. Rep. 65, this court drew clearly the distinction I am trying to draw here between judicial and ministerial acts, and defined the liability of the officers and their sureties as for each. This court in that case said: "It is an unquestioned rule, founded on the public benefit, the necessity of maintaining the independence of the judiciary, and its untrammeled action in the administration

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of justice, that a judge cannot be held to answer in a civil suit for doing, or omitting or refusing to do, an official act in the exercise of judicial power. His responsibility for the manner in which he discharges the high trusts committed to him is to the sovereignty from whom he derives his authority. It is, also, an undisputed rule that an officer who is charged with the performance of ministerial duties is amenable to the law for his conduct, and is liable to any party specially injured by his acts of misfeasance or nonfeasance. When the law assigns to a judicial officer the performance of ministerial acts, he is as responsible for the manner in which he performs them, or for neglecting or refusing to perform them, as if no judicial functions were intrusted to him. The boundary of his judicial character is the line that marks and defines his exemption from civil liability. Our law, organic and statutory, confers on the probate judge large judicial powers, and there is also assigned to him the performance of many acts merely ministerial; he is both a judicial and a ministerial officer. In *Thompson v. Holt*, 52 Ala. 491, it is observed: ‘A bond was, by legislation, demanded from him as a guaranty for diligence and fidelity in the performance of his ministerial duties, as it is exacted from other mere ministerial officers. It is not a guaranty for his integrity and fidelity as a judge. For this no other security is demanded from him than that demanded from all other judicial officers—his official oath, and the sense of responsibility which the power and dignity of the office inspire. The official bond stands as an indemnity against his errors, or his willful misconduct, as a ministerial officer only,’ etc.”

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Woolf *v.* McGaugh.

Trespass.

(Decided December 27, 1911. Rehearing denied February 15, 1912.
57 South. 754.)

1. *Courts; Jurisdiction; Personal Action.*—In personal actions the jurisdiction depends upon the subject matter and the presence in court of the parties whose rights are to be affected by the judgment.

2. *Same; Inherent Power; Subject Matter.*—Since by the subject matter is meant the nature of the cause of action and of the relief sought jurisdiction thereof is acquired by the act creating the court, or its constitution only.

3. *Same; Jurisdiction of Person.*—Jurisdiction of the person is acquired by the court's own action such as its process regularly issued and served, or by the voluntary appearance of the party.

4. *Same; Local Action; Transitory Action.*—Where the cause of action can arise in one place only it is local, but if the cause of action is such a one as might have arisen anywhere, it is transitory.

5. *Same; Trespass.*—Actions for trespass to land are only for damages to be coerced by process against the effects of a defendant to be found within the state, and the title to land cannot be therein adjudicated and hence, such action is personal, and its inherent character as such determines the jurisdiction of the court as to the subject matter.

6. *Same; Personal Action; Waiver.*—In personal actions, territorial jurisdiction or venue may be waived.

7. *Same; Injuries to Realty.*—The general rule is that actions for injuries to realty must be brought in the *forum rei sitae*.

8. *Same; Subject Matter; Consent.*—Jurisdiction of the subject matter being derived only from the law, consent cannot confer jurisdiction.

9. *Same; Jurisdiction of Person.*—If the court has jurisdiction of the subject matter, the parties may confer jurisdiction by consent, or by voluntarily appearing and submitting themselves to the judgment.

10. *Same; Determination of Jurisdiction.*—Where it appears that judgment is asked in a cause which the court has no power to decide under any circumstances, the court should repudiate the action *ex mero motu*, as no plea is necessary to prevent the court proceeding to the rendition of a void judgment.

11. *Same; Statutory Provision; Waiver.*—The statutory provisions fixing the local jurisdiction in both law and equity courts may be waived by a failure to make timely objection.

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12. *Venue; Trespass; Waiver of Objection.*—Where a party neglects to assert his rights within a reasonable time, having cause to set aside any process or proceeding, he waives the objection by such neglect, and the provisions of section 6110, Code 1907, fall within this rule.

13. *Justice of Peace; Trespass; Waiver of Jurisdiction.*—Where the action was brought in M. county for trespass to lands situated in L. county and no plea to the jurisdiction was interposed until after the cause had been twice continued, once at the plaintiff's instance and once by agreement of parties, and until after plaintiff had announced ready on the merits, the defendant waived his right to plead in abatement by his delay, notwithstanding the provisions of section 6110, Code 1907.

14. *Appeal and Error; Abatement; Plea; Abandonment.*—Where the right to plead in abatement in the justice court had been lost or abandoned, it cannot be revived by an appeal to the circuit court, on which appeal the case is governed by the provisions of section 4720, Code 1907.

APPEAL from Montgomery Circuit Court.

Heard before Hon. W. W. PEARSON.

Action by B. Wolff and others, against Paul McGaugh, for damages for trespass to realty. Judgment for plaintiff in the justice court, and on appeal to the circuit court, defendant was allowed to file a plea to the jurisdiction, and plaintiff reserves the question. Reversed and remanded.

TYSON, WILSON & MARTIN, for appellant. The plea sought to be interposed merely challenged the jurisdiction of the court over the defendant, and not over the subject matter.—*Freeman v. McBroom*, 11 Ala. 493; *Branch Bank v. Rutledge*, 13 Ala. 196; *Thompson v. Clopton*, 31 Ala. 647; *Johnson v. Shaw*, 31 Ala. 592; *Noles v. Marrable*, 50 Ala. 366; *Home Protection v. Richards*, 74 Ala. 466; *Gay v. Brierfield C. Co.*, 94 Ala. 303; S. C. 106 Ala. 622. By his action in the justice court, defendant waived the right to interpose on appeal to the circuit court his plea in abatement.—*Vaughn v. Robinson*, 22 Ala. 519; *Glaze v. Blake*, 56 Ala. 387; *Black v. Glenn*, 69 Ala. 121, and authorities supra; 22

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E. & E. Enc. P. & P. 815. On these authorities section 6110, Code 1907, is a venue statute and nothing more. See also *Southern Pac. v. Denton*, 146 U. S. 202. Whether the justice of peace was right or wrong in not permitting defendant's plea in abatement, his action cannot be reviewed on this appeal, but the defendant must have recourse to some other mode of procedure.—*Wilson v. Collins*, 9 Ala. 127.

H. S. HOUGHTON, for appellee. The court had no jurisdiction of the subject matter, and this appeared from the face of the complaint.—21 Enc. P. & P. 792; 11 Cyc. 673; 1 Chitty 282; Sec. 6110, Code 1907. The right to file the plea was determined by our court in the case of *Karthaus v. N. C. & St. L.*, 140 Ala. 433. The same rule is stated in 11 Cyc. 673. Where want of jurisdiction appears upon the face of the proceedings demurrer will lie.—*Haricell v. Lehman Durr Co.*, 72 Ala. 344; *Lewis v. Elrod*, 38 Ala. 2; 22 Enc. P. & P. 813; 1 Chitty 290. It was within the discretion of the court to permit the plea to be filed.—*Mosely v. The State*, 11 Ala. 340; *Hawkins v. Armour P. Co.*, 105 Ala. 545. Counsel discuss authorities cited by appellant and conclude that they are without application.

SAYRE, J.—In their complaint in this action, which was begun before a justice of the peace in Montgomery county, the plaintiffs claimed of the defendant "the sum of \$100 mesne profits as damages for a trespass committed by him" on certain lands in Lowndes county, "which are in the possession of the plaintiffs and upon which the defendant unlawfully entered, thereby putting a tenant upon said lands, renting the same out, and collecting from said tenant said rents for the years 1906, 1907, 1908, and 1909." Judgment went for plain-

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tiffs. Upon appeal in the circuit court, the defendant offered to file a plea to the jurisdiction for that the suit was a suit for trespass to real estate situated in the county of Lowndes. In support of their objection to the filing of this plea plaintiffs showed to the court that the defendant had offered to file the plea in the court of original jurisdiction upon the trial of the cause, but that this offer had not been made until after the cause had been twice continued, once at the instance of the plaintiffs, and the second time by consent of the parties, and after plaintiffs had announced ready on the merits, and that the justice of the peace had declined to allow the plea to be filed. The circuit court allowed the plea to be filed, and plaintiffs reserved the question.

It is suggested, and doubtless it was the case, that the court below was induced by the decision in *Karthaus v. N. C. & St. L. Ry. Co.*, 140 Ala. 433, 37 South. 268, to hold that the plea in question was a plea to the jurisdiction of the court over the subject-matter of the suit, and that the right to plead it could not be waived in any manner. In that case the complaint contained counts in trover and trespass to realty. The plea, addressed to the complaint as a whole, took the point that a suit for trespass to realty in Marshall county could not be maintained in the circuit court of Madison. The language of the court indicates the opinion that a plea of that character went to the power of the court in such sort that, if the facts stated in the plea were true, any judgment which the court might have rendered in favor of the plaintiff on the count in trespass would have been a nullity. The specific ruling was that the judgment be reversed because the trial court refused plaintiff's offer to obviate the plea by striking the count in trespass, the court saying also that the plea was defective because not limited

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in purpose to the quashing of the summons as to that count, all of which would have followed with equal propriety had the plea been considered as taking an objection which the defendant might have waived. While it seems therefore, that what was said in respect to the court's utter lack of power to render a judgment for the plaintiff, though no plea were interposed, went beyond the necessities of the case, it must be conceded that it was appropriately said, if sound in principle.

Jurisdiction in personal actions depends upon two elements: The subject-matter to be adjudged; the presence in court of the parties whose rights are to be affected by the judgment. In respect of subject-matter the court acquires jurisdiction by the act of its creation; it is inherent in the constitution of the court. The other element it acquires by its own act, by its process properly issued and served, or by voluntary appearance of the defendant.—*Lamar v. Commissioners' Court*, 21 Ala. 772. “By jurisdiction over the subject-matter is meant the nature of the cause of action and of the relief sought.—*Cooper v. Reynolds*, 10 Wall. 316, 19 L. Ed. 931.

Originally, venue entered into the question of jurisdiction in all cases, and all actions were local. This arose out of the nature of trial by jury in which the jurors, who were but witnesses, were taken from the vicinage because they were presumed to know the parties and the facts. Later, when it became necessary to meet the case of debtors who had learned to run away, transitory actions were invented. The courts finally settled upon this distinction: If the cause of action was one that might have arisen anywhere, then the action was transitory; but, if the cause of action could arise in one place only, then the action was local. Actions for trespass to land are still classed with local actions under

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our statute, which provides that: "All actions for the recovery of land, or of the possession thereof, or for a trespass thereto, must be brought in the county where the land lies; a summons issuing contrary to this section must be abated on the plea of the defendant."—Code, § 6110. The rule of the common law concerning jurisdiction in local causes was based upon the theory that such actions, being in the nature of suits in rem, should be "prosecuted where the thing on which they were founded was situated."—*Casey v. Adams*, 102 U. S. 66, 26 L. Ed. 52. It may be true that the action of ejectment and the possessory actions partake of the nature of suits in rem for the reason that the court undertakes to deliver the land; but it is true in a limited way only, because those actions are prosecuted without a preliminary seizure of the subject-matter, and jurisdiction must be acquired by personal service upon the defendant.

It is not perceived, however, that an action to recover damages for trespass to realty partakes in any degree whatsoever of the nature of an action in rem. In trespass, in this state where the title to land cannot be adjudicated in the action of trespass, the whole prayer is for reparation in damages to be coerced by process against any effects of the defendant to be found within the state. Not being brought for the specific recovery of lands, tenements, or hereditaments, the action is personal.—3 Bouv. Inst. 2641; *Hall v. Decker*, 48 Me. 255; *Linscott v. Fuller*, 57 Me. 406. Inherently the action is personal, though the statute still leaves it in the same category as to venue with local actions. Its inherent character also determines the jurisdiction of the court as to subject-matter; its treatment as a local action, under the statutes, determines the territorial jurisdiction, the venue.

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Territorial jurisdiction, or venue, may be waived, at least in personal actions. In *Sentenis v. Ladew*, 140 N. Y. 463, 35 N. E. 650, 37 Am. St. Rep. 569, the plaintiffs impleaded the defendants in the Supreme Court for a trespass upon real property in the state of Tennessee. Plaintiffs defaulted, and there was judgment dismissing their complaint, with costs. Plaintiffs subsequently moved to set the judgment aside upon the ground that the court had no jurisdiction of the subject-matter of the suit, and could not, therefore, enter a valid judgment for the costs. The court recognized the general rule of law that actions for injuries to realty must be brought in the *forum rei sitæ*. But it said: "A party may waive a rule of the law or a statute, or even a constitutional provision enacted for his benefit or protection, where it is exclusively a matter of private right, and no considerations of public policy or morals are involved, and, having once done so, he cannot subsequently invoke its protection." The judgment was upheld. In *Little v. Chicago, etc., Ry. Co.*, 65 Minn. 48, 67 N. W. 846, 33 L. R. A. 423, 60 Am. St. Rep. 421, the action for trespass in another state was upheld notwithstanding the defendant's insistence to the contrary at the threshold of the case. But as to such a case the authorities are in conflict.—*Howard v. Ingersoll*, 23 Ala. 673; *Allin v. Connecticut River Lumber Co.*, 150 Mass. 560, 23 N. E. 581, 6 L. R. A. 416. This conflict in the cases does not involve the material point in the case at hand, for here an Alabama court was disposing of an asserted cause of action which arose in this state, if at all.

Consent cannot confer jurisdiction of the subject-matter, for that is derived from the law. But when a court has jurisdiction of the subject-matter, parties may confer jurisdiction of their persons by submitting them-

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selves to its decisions. As was observed by BRICKELL, C. J., in *Ex parte Rice*, 102 Ala. 671, 15 South. 450, "there is a wide difference between conferring jurisdiction by consent, and consenting to something within the power of the court, deemed promotive of the convenience of the parties." And it was said to be a fixed rule of all courts that, where a party having cause to set aside any process or proceedings neglects to assert it within a reasonable time, the objection is thereby waived. The language of the statute fixing the venue of actions at law (Code, § 6110) indicates that it was framed in recognition of the view here expressed, for it makes error in laying the venue a matter for plea in abatement, thereby excluding the idea that it becomes the duty of the court in such case to repudiate the cause *ex mero as is* its duty whenever it appears that its judgment is asked in a case it has no power to decide under any circumstances. No plea can be necessary in order to prevent the court from proceeding to the rendition of a void judgment.

It has often been held by this court that the statutory provisions fixing the local jurisdiction in both law and equity courts might be waived by a failure to make timely objection. In *Freeman v. McBroom*, 11 Ala. 943, the defendants had answered without objecting that the bill was filed in an improper chancery district; but on that fact the chancellor based his decree that the court could not exercise jurisdiction in the cause. The decree was reversed; this court saying: "The objection at most is only in abatement of the suit, without denying to the complainant a right to the redress which he seeks. It applies to the locality of the jurisdiction whose powers are invoked, and not to the case itself, as one to which chancery should lend its aid. * * * It has frequently been held, in suits at law, that when the court has no

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jurisdiction of the subject-matter in dispute, such want of jurisdiction cannot be waived by appearance, plea, consent, or in any other manner, and a judgment rendered in such case in favor of the plaintiff will be void. Yet where the court has jurisdiction of the subject-matter, but not of the person, such want of jurisdiction of the person may be waived by consent, or by plea to the merits, and cannot afterwards be asserted." This was a case in chancery; but like distinctions prevail in courts of law and equity, and there can be no sufficient reason why the statute fixing the venue of equity cases and requiring bills to be filed in the district in which the defendants or a material defendant resides, etc. (Code, § 3093), should be construed to be a venue statute merely, and a different construction placed upon section 6110 fixing the venue of action in courts of law. We cite some cases at law and in equity: *Freeman v. McBroom*, 11 Ala. 943; *Branch Bank v. Rutledge*, 13 Ala. 196; *Johnston v. Shaw*, 31 Ala. 592; *Thompson v. Clopton*, 31 Ala. 647; *Noles v. Marable*, 50 Ala. 366; *Glaze v. Blake*, 56 Ala. 387; *Home Protection Co. v. Richards*, 74 Ala. 466. This is the rule of the courts generally. "It may be stated as a general rule that the bringing of an action in an improper county is not a jurisdictional defect, where the court has general jurisdiction of the subject-matter, and the statutes fixing the venue in certain actions confer a mere personal privilege which may be waived by a failure to claim it in a proper manner and at the proper time."—22 Encyc. of Pl. & Pr. 815, 816, and notes, where many cases, including some of our own to which we have referred, are cited.

We are therefore of opinion that the courts of Montgomery county having jurisdiction of the subject-matter of that class of cases in which redress is sought for trespass to realty, the fact that the trespass in the particu-

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lar case was committed in another county is made by the statute the basis of a personal privilege to have the suit brought in the county where the trespass occurred, which must be pleaded and may be waived. The plea interposed raised a question as to the manner of acquiring the right to exercise jurisdiction, rather than a question as to the court's jurisdiction of the subject-matter of the controversy.

Defendant (appellee), having been summoned to answer before the justice of the peace, failed to plead his privilege at the return term of the summons. There was one continuance at the instance of the plaintiffs, and another by consent of the parties. This, under the authority of our cases, was a waiver of the plea in abatement.—*Nolcs v. Marable, supra; Beck v. Glenn*, 69 Ala. 121. And the right to plead in abatement, having been once abandoned in the justice's court, cannot be revived by an appeal to the circuit court. On such appeal the case must be tried according to equity and justice, without regard to any defect in the summons, or other process, or proceedings before the justice.—Code, § 4720; *Thompson v. Clopton; Nolcs v. Marable, supra*. It may be that the justice of the peace had a discretion to allow the plea under the rule laid down in *Vaughan v. Robinson*, 22 Ala. 519, and *Hackins v. Armour Packing Co.*, 105 Ala. 545, 17 South. 16; but that discretion, having been exercised against the defendant, could not be made the subject of review in the circuit court where the case stood for trial de novo. The plaintiffs, on the faith of the justice's ruling, had tried their case on the merits, and had gone to the circuit court prepared presumably to try their case again on the same issues. They had suffered delay, and it may be presumed had incurred costs in preparing for these different trials. These consequences must be charged, not to the ruling of the jus-

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tice of the peace, for that cannot be said to have been erroneous, but to the defendant's original delay in filing his plea or making his dilatory defense known to the justice and the plaintiffs. At no point along the line does it appear that plaintiffs were in default. Under the circumstances, we think it must be held that the circuit court erroneously allowed the plea in abatement.

Reversed and remanded. All of the Justices concur, except DOWDELL, C. J., not sitting.

Richardson, et al. v. Mertins.

Trover.

(Decided February 17, 1912. 57 South. 720.)

1. *Appeal and Error; Review; Waiver.*—The mere assertion that the demurrer was improperly overruled is not such an argument on the assignment of error to the overruling of the demurrer as will prevent a waiver of the assignment.

2. *Same; Review; Presumption.*—Where the demurrers which were sustained by the trial court are not set out in the record, it will be presumed on appeal that they properly stated a valid objection to the pleading, if any existed.

3. *Pleading; Demurrer; Good in Part; Determination.*—Where a replication sets up as an answer to all the pleas collectively the single fact that the plaintiffs were minors at the time of the filing of the suit, there was no error in sustaining demurrers to such replication if, in fact, it is not a good defense to each and all of the special pleas.

4. *Limitation of Actions; Computation of Period; Personal Disability; Infancy.*—Sections 4846 and 4860, are in pari materia and the saving statute operates in favor only of the person to whom the cause of action first accrued, and not to those who succeeded to his rights, unless at the time of their succession the statute had not begun to run against their predecessor in right; hence, a plaintiff claiming the benefit of the exception in favor of infants must show either that the cause of action accrued to him originally or that he had succeeded to the rights of one against whom limitations had never begun to run.

APPEAL from Montgomery City Court.

Heard before Hon. WILLIAM H. THOMAS.

[Richardson, et al. v. Mertins.]

Action by Minnie Reese Richardson and others, by next friend against J. A. L. W. Mertins, in trover. Judgment for defendant and plaintiffs appeal. Affirmed.

BALL & SAMFORD, for appellant. The plea did not take into consideration the provisions of section 4846, giving minors the right to sue until the termination of their disability, and hence, this section and its citation disclose the error of the court in overruling the demurrers to plaintiff's replication.

G. F. MERTINS, and **STEINER, CRUM & WEIL**, for appellee. The replication was filed to the pleas collectively, and as it is apparent that it is not good as to some of them, the court properly sustained the demurrer thereto. The appellant does not make such an insistence as will authorize the court to review his assignment as to the demurrer. The saving clause has no application to these plaintiffs, as it appears that they were successors in right to one against whom the statute already had begun to run before their interest was acquired.

SOMERVILLE, J.—The plaintiffs sued the defendant in trover for the conversion by her on or about November 25, 1908, of certain chattels, the property (as alleged) of plaintiffs. The summons describes the plaintiffs as "minors who sue by M. R. R., as next friend." In the caption to the complaint they are described as "M. R. R. and C. R. by M. R. R., as next friend." The defendant's pleas were as follows: "(1) The general issue. (2) The defendant for answer to the complaint saith: That the plaintiffs' cause of action, if any they had, is barred by the statute of limitations of six years. (3) The cause of action of the plaintiffs, or of those under whom they claim, accrued more than six years

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prior to the bringing of this suit. (4) The property for the conversion of which this suit was brought came into the possession of the defendant if at all under claim of right more than six years prior to the institution of this suit. Wherefore," etc. A demurrer was interposed to these pleas collectively on the grounds that the complaint showed that the plaintiffs were minors when the suit was instituted, and that the statute of limitations would not begin to run against them until they were of age. This demurrer was overruled, and error is separately assigned for overruling the demurrer to plea 2, to plea 3, and to plea 4.

However, counsel do not argue these assignments of error other than by asserting that the demurrer was improperly overruled. This, under the practice and rulings of this court, must be treated as a waiver of the assignments.

The plaintiffs filed four replications to these pleas, collectively, as follows: "(1) That they had no knowledge of the conversion by the defendant of the property sued for until on or about the date named in the complaint. (2) That, even if the allegations of said pleas are true, they were minors at the time of the filing of this suit. (3) That they had no knowledge of the whereabouts of the property sued for until November, 1908, although they made diligent efforts to ascertain the location of said property which was fraudulently withheld from them by one Wm. Pullium from whom defendant obtained them directly or indirectly. (4) That the defendant came into the possession of the property sued for by and through one William Pullium, who had no authority to sell or dispose of said property, and that in the disposition of said property by said Pullium he was guilty of embezzlement by which a fraud was practiced on them, of which they had no knowledge until

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about the time named in the complaint and suit was filed in less than a year from said time."

The judgment entry shows that the court sustained defendant's demurrers to these replications, but the demurrers are not set out in the record. In such a case this court always presumes in support of the judgment that the demurrer properly stated a valid objection to the pleading, if any there be.

The only question argued by appellants' counsel is the sufficiency of the second replication, and so we shall not consider the several assignments of error relating to the first, third, and fourth replications.

The second replication offers as an answer to all the pleas, collectively, the single fact that plaintiffs "were minors at the time of the filing of this suit." If this fact is not a good defense to each and all of defendant's special pleas, then, of course, the trial court cannot be held in error for its elimination by demurrer.

Section 4846 of the Code allows in general three years additional to infants within which to bring suit after coming of age, if they were minors "at the time such right accrued." It is the saving effect of this statute that is invoked by the replication. Section 4860 of the Code provides that "a disability which did not exist when the cause of action accrued does not suspend the operation of the limitation, unless the contrary is expressly provided." These statutes are construed in pari materia, and it is thoroughly well settled that the saving statute operates in favor only of the person to whom the cause of action first accrued, and not of those who succeed to his rights, unless at the time of their succession the statute had never begun to run against their predecessor.—*Doc v. Thorp*, 8 Ala. 253; *Underhill v. Mobile, etc., Ins. Co.* 67 Ala. 45; *Black v. Pratt, C. & C. Co.*, 85 Ala. 504, 5 South. 89; *Oliver v. Williams*, 163

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Ala. 376, 50 South. 937. In *Doe v. Thorp*, where the question was first given full consideration, this court, construing the act of 1843, said: "The saving clause expends itself upon the person first entitled to an action, if he is in the predicament to require the benefit of it; and, if the disability be once removed, the time must continue to run, notwithstanding any subsequent disability, either voluntary or involuntary." And, referring to the English statute on the same subject, it is observed that "the courts of England have, therefore, properly extended it only to the persons to whom the right then accrued, and not to those to whom it should afterwards come; so that, on the death of a person in whose life the statute first began to run, his heir must enter within the residue of the period allowed for making the entry, although he labored under a disability at the death of his ancestor." Although, as subsequently codified, the phraseology of the act of 1843 was changed, this principle of construction has always been adhered to, and it was declared in *Black v. Pratt, C. & C. Co.*, 85 Ala. 508, 5 South. 92, that "a party claiming the benefit of an exception or proviso in the statute of limitations can only avail himself of the disability which existed when the right of action first accrued." It is apparent at a glance that the accrual of the right of action to the plaintiff, as referred to in the saving statute, is a matter wholly distinct from the accrual of the cause of action as referred to in section 4860, above quoted; and this distinction is vital, we think, to the decision of the question presented.

A plaintiff claiming the benefit of this exception in favor of infants must bring himself not only within the terms of the saving statute, but must also exclude the qualifying influence of section 4860. It is not enough that he is an infant when he sues, and must, therefore,

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have been an infant when the right of action accrued to him. He must also show either that the cause of action accrued to him originally, or else that he has succeeded to the rights of one against whom the limitation had never begun to run. The replication was therefore subject to demurrer in this respect, in so far as it attempted to answer the second and third pleas, and the trial court did not err in so holding.

Affirmed. All the Justices concur.

Nabors v. Brown, et al.

Trespass to Realty.

(Decided January 16, 1912. 57 South. 374.)

1. *Appeal and Error; Filing Transcript; Delay; Dismissal.*—Where an appeal was taken September 10, 1910, and the transcript was not filed until November 21, 1911, after the adjournment of the 1910-11 term of the Supreme Court, there was such a delay in filing the transcript as will work a dismissal of a cause on motion of appellee filed the first day it could be considered, notwithstanding that since the submission an affidavit was filed averring that the transcript was not received from the clerk until after the adjournment of such term of the Supreme Court.

2. *Same; Excuse.*—An affidavit seeking to excuse delay in filing the transcript in this court should be filed before the submission of the cause.

APPEAL from Tallapoosa Circuit Court.

Heard before Hon. S. L. BREWER.

Action by B. F. Nabors against R. T. Brown and others, for trespass to realty. Judgment for defendant and plaintiff appeals. Appeal dismissed.

RIDLE, ELLIS, RIDDELL & PRUET, for appellant. Counsel discuss the assignments of error on the merits and cite authority in support of their contention, but in view of the opinion it is not deemed necessary to set them out.

[*Nabors v. Brown, et al.*]

On the motion to dismiss counsel insist that the motion should be denied because of the affidavit filed, and on the authority of *Street v. Street*, 113 Ala. 333.

BRIDGES & OLIVER, and JOEL F. WEBB, for appellee. The appeal should be dismissed on the authority of *Sears v. Kirksey*, 81 Ala. 98; *Winthrow v. Woodward I. Co.*, 81 Ala. 100; *Porter v. Martin*, 139 Ala. 318. Counsel discuss the merits of the case with citation of authority, but in view of the opinion it is not deemed necessary to set them out.

SIMPSON, J.—It appears from the record that the appeal was taken on the 10th day of September, 1910, and the transcript was not filed until November 21, 1911, so that the entire term of this court, commencing November 14, 1910, passed before the case was placed upon the docket. The statute requires appeals taken in vacation to be made returnable to the next term of the Supreme Court, and under our decisions such appeal must be dismissed, on motion seasonably made, at the next ensuing term of the court.—*Winthrow & Gordon v. Woodward Iron Co.*, 81 Ala. 100, 2 South. 92; *Sears v. Kirksey*, 81 Ala. 98, 2 South. 90; *Porter et al. v. Martin et al.*, 139 Ala. 318, 35 South. 1006; *Southern Railway Co. v. Abraham Bros.*, 161 Ala. 317, 49 South. 801. Since the submission of this case, the appellant has filed an affidavit of his attorney, to the effect that he did not receive the transcript from the clerk of the court until after the adjournment of the last term of this court.

In addition to the fact that the affidavit should have been filed before the submission of the case, the case of *Street v. Street*, 113 Ala. 333, 21 South. 138, does not support the contention of the appellant, for the reasons

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that, in that case, the transcript was filed before the expiration of the term to which it was returnable, and the motion to dismiss was not filed until after the time prescribed by statute, which facts are emphasized in the opinion of the court. In this case, the motion to dismiss was filed at the first day when it could be considered, to wit, at the first call of the division of the succeeding term of this court. In order to keep up the continuity of his appeal, the appellant should have had the case docketed and continued at the term to which the appeal was returnable.

The appeal in this case must be dismissed.

Appeal dismissed. All the Justices concur, save DOWDELL, C. J., not sitting.

A. P. Loveman & Co. v. Alabama, Tennessee & Northern R. R. Co.

Failure to Deliver Goods.

(Decided December 22, 1911. Rehearing denied February 15, 1912.
57 South. 817.)

Carriers; Loss of Goods; Bill of Lading; Issuance Before Delivery.—Before a carrier can be made liable for goods, there must be a delivery actual or constructive to the carrier. The facts of this case examined and under the rule above announced, it is held that it is not shown that the goods for whose destruction damage is sought was delivered to the carrier in such a manner as to render the carrier liable for their loss.

APPEAL from Pickens Circuit Court.

Heard before Hon. S. H. SPROTT.

Action by A. P. Loveman & Co. against the Alabama, Tennessee & Northern Railroad Company for failure to deliver cotton. Judgment for defendant, and plaintiffs appeal. Affirmed.

It appears from the evidence that the cotton was in a warehouse in Aliceville that was owned and operated

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by Arch Hood, who was also cotton agent for the defendant company for Aliceville. It also appeared that the bills of lading upon which the suit was brought were issued by said Hood as such agent while the cotton was still in his warehouse; that the cotton was burned the night after the bill of lading was issued, and before it was ever loaded on the cars of the defendant; that the bills of lading were delivered to one Buntin, agent of the plaintiff, who knew, when he received the bills of lading, that the cotton was still in the warehouse, and that the warehouse receipts which had been issued for the cotton had not then or since been redelivered to the warehouseman, Hood; that Hood had no authority to issue bills of lading for cotton as the agent of defendant until the cotton had been loaded on the cars; and that plaintiff's agent, Buntin, knew that Hood had no authority to issue bills of lading in the name of the defendant until the cotton had been loaded. It further appeared that the fire which destroyed the cotton was not caused by any act of negligence of omission or commission on the part of the defendant or its servants and agents, and that the defendant had nothing to do whatever with the management or control of the warehouse, nor any interest therein, and that no train passed going towards Tuscaloosa after the bills of lading were issued that could have hauled the cotton from Aliceville to Tuscaloosa. There was also evidence as to the duty of the warehouseman to load the cotton, and as to the forms of bills of lading. There was evidence as to the insurance, etc., not necessary to be here set out.

DANIEL COLLIER, and R. H. SCRIVENER, for appellant.
The court erred in overruling demurrer to plea 3.—
Sec. 5546, Code 1907; *A. G. S. v. McClesky*, 49 South. 433; *N. C. & St. L. v. Parker*, 123 Ala. 690. Plea 7

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should have been verified.—Sec. 5332, Code 1907; *Bryan v. Wilson*, 27 Ala. 208. There was a delivery of the cotton to the common carrier in such a sense as to render it liable.—*M. & E. R. R. Co. v. Kolb*, 73 Ala. 396; *Hutchison on Carriers*, sec. 90; *L. & N. v. Touart*, 97 Ala. 518. At least, this was a question for the jury.—*L. & N. v. Odom*, 80 Ala. 43; *Couherd's case*, 123 Ala. 53.

OLIVER, VERNER & RICE, for appellee. The cotton had never been delivered to defendant, and hence, defendant was in no sense liable for its loss.—*Lehman-Durr Co. v. Pritchett*, 84 Ala. 514; Sec. 6132, Code 1907. The law will not allow a right to spring from its own violation.—*Moog v. Hansen*, 93 Ala. 503, and cases cited. The court will not assist the parties to enforce an illegal contract.—*Jemison v. B. & A.*, 125 Ala. 383. It was not the intention of the legislature by the enactment of section 5546, Code 1907, to deny the carrier the right to show that it had not received the property.—*Gridley v. L. & N.*, 119 Ala. 523. In any event, plaintiff had received the full value of the cotton from the insurance company.

McCLELLAN, J.—Mr. Hood's contemporary, yet wholly distinct and independent, relations of warehouseman and of "cotton agent" of the defendant, which was without interest, in any degree, in the warehouse business conducted by Mr. Hood individually, rendered it impossible, under the doctrine of the decision in *Lehman, Durr & Co. v. Pritchett*, 84 Ala. 512, 4 South. 601, for Mr. Hood, as warehouseman, to *deliver*, actually or constructively, the cotton in question to the common carrier (the defendant, appellee) while there was outstanding, undelivered and uncanceled, warehouse receipts

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therefor, issued by him as warehouseman. Without delivery to the common carrier, no responsibility or liability, in respect of the cotton, could have or did exist against it. There is no statute obviating, or attempting to obviate, the necessity of delivery, actual or constructive, in order to impose responsibility or liability upon a carrier. Custom is impotent to avoid the requirements of positive statute law.

Upon this theory, independent of any others advanced or adopted by the trial court in giving the affirmative charge for the defendant (appellee), that ruling was clearly justified.

Affirmed.

ANDERSON and MAYFIELD, JJ., concur in the opinion. SIMPSON, SAYRE and SOMERVILLE, JJ., concur in conclusion.

Gassenheimer *v.* Western Railway of Alabama.

Assault and Battery.

(Decided February 8, 1912. 57 South. 718.)

1. Corporation; Torts; Liability; Employee.—A corporation is liable for the wrongful act of its employees done in the course of their employment or line of their duty.

2. Master and Servant; Assault by Servant; Liability of Master.—The facts in this case examined and held to hold the master for liability for an assault by a servant, or at least that the master could not avoid liability on the ground that it was not within the scope of the servant's authority, since it was committed as a result of plaintiff's complaint about such servant's delay.

APPEAL from Montgomery Circuit Court.

Heard before Hon. W. W. PEARSON.

[*Gassenheimer v. Western Railway of Alabama.*]

Action by Leo Gassenheimer against the Western Railway of Alabama, for damages for assault and battery alleged to have been committed on him by one of defendant's freight delivery clerks. From a judgment overruling motion for new trial plaintiff appeals. Reversed and remanded.

LETCHER, MCCORD & HAROLD, for appellant. The motion for a new trial should have been granted.—*A. G. S. v. Powers*, 73 Ala. 248; *Cobb v. Malone*, 92 Ala. 630; *T. C., I. & R. R. Co. v. Stevenson*, 115 Ala. There was absolutely no conflict in the evidence, and hence, the new trial should have been granted.—*Hamilton v. Maxwell*, 133 Ala. 233. The appellant, under the evidence, was entitled to at least nominal damages.

STEINER, CRUM & WEIL, for appellee. Under the facts in this case defendant was not liable to plaintiff.—*Hardeman v. Williams*, 150 Ala. 415; *Goodloe v. M. & C.*, 107 Ala. 233; *Everlington v. Chicago Ry.*, 127 N. W. 1009. This being true, plaintiff cannot complain of the refusal to grant a new trial.—*Bienville v. City of Mobile*, 125 Ala. 184; *Cole v. Propst*, 119 Ala. 99; *Abbott v. Mobile*, 119 Ala. 599.

SAYRE, J.—Plaintiff sent a drayman from his place of business to the freight house of the defendant railway company to fetch some freight. Considerable delay ensuing, plaintiff went to see what was the matter. He found the drayman waiting at the freight house. Then Mabson, one of defendant's delivery clerks, came up saying: "I will deliver the freight." The freight bills were then handed to Mabson, and plaintiff went to the office in another part of the building, where he complained of the delay to Mabson's superiors. He

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does not seem to have mentioned Mabson's name. Mr. Lutz, commercial agent for the railway, and Mr. Stanley, chief clerk, then walked down the freight house in company with the plaintiff, inquiring of several of the delivery clerks what they knew about plaintiff's dray having to wait for freight. When they reached Mabson, who was then and there engaged in defendant's business of delivering freight, he, without a word, or, so far as the evidence shows, a demonstration of any sort from the plaintiff, applied to plaintiff a most offensive epithet, and struck and kicked him. The assault left behind it no physical injury. Plaintiff sued the railway company for the assault and battery committed by its agent, and, the jury having acquitted the defendant, made a motion for a new trial on the ground that the verdict was contrary to the law and the evidence. From a judgment overruling the motion, plaintiff appeals.

The court below makes it clear that the jury might have inferred that Mabson assaulted plaintiff because plaintiff had made complaint to his superior officers, and that an assault committed for such reason was not within the scope of Mabson's employment. In this the court erred. It is well settled in the decisions of this court that corporations are liable for the wrongful acts of their agents or employees, done in the course of their employment, or in the line of their assigned duties. The difficulty in particular cases arises in the proper application of this principle of law to the facts. The case of *Case v. Hulsebush*, 122 Ala. 212, 26 South. 155, is strikingly like the case at bar in all essential respects. In that case the tax collector of Mobile county was held personally liable for an assault and battery committed by his deputy upon a taxpayer who had gone to the collector's office to pay taxes. The assault grew out of a dispute about a fee the deputy sought to col-

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lect. In the case at hand there is nothing to indicate, however remotely, that the assault grew out of anything but the delay in the delivery of plaintiff's freight. The trial court referred the assault, or held that the jury might have referred it, to the fact that plaintiff had complained to Mabson's superior officers. But the complaint was about the delay, and we have no difficulty in taking all that occurred between plaintiff and Mabson and Mabson's superiors as part and parcel of one transaction. In this state of the evidence the plaintiff was entitled to have the verdict set aside. "There is no more sacred duty resting on the presiding judge than to set aside a verdict which is rendered in palpable disregard of the evidence."—*A. G. S. Ricy. Co. v. Powers*, 73 Ala. 248. And since the passage of the act permitting the review of rulings on such motions this court has frequently reversed judgments where the preponderance of the evidence against the conclusions reached in the trial courts was so decided as to involve the conviction that they were wrong and unjust.—*Birmingham National Bank v. Bradley*, 116 Ala. 142, 23 South. 53; *Southern Ricy. Co. v. Lollar*, 135 Ala. 375, 33 South. 32, and cases cited. No doubt the court below, but for the theory entertained in respect to the origin to which the jury might have referred the difficulty as sufficient to take the assault upon plaintiff without the scope or course of Mabson's assigned duties, would have granted a new trial. But that theory of fact and law, under the authority of our rulings heretofore, was misconceived.—*Case v. Hulsebush*, 122 Ala. 212, 26 South. 155, and cases there cited. It results that the judgment must be reversed, and the cause remanded for another trial on the facts as they may then appear.

Reversed and remanded. All the Justices concur, except Dowdell, C. J., not sitting.

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Trespass to Chattels.

Decided January 18, 1912. Rehearing denied February 15, 1912.
 57 South. 854.)

1. *Trespass; Plea; Uncertainty.*—As a defense to an action of trespass for wrongfully taking a stock of goods, plea 3 examined and held insufficient as being confusing in effect, and for failure to describe with sufficient certainty the action set up in justification; such plea was also insufficient for failing to show that the writ of attachment set out therein was ever returned.

2. *Same; Justification.*—As an answer to an action of trespass for wrongfully taking a stock of goods, a plea attempting to show that the goods were taken under an attachment and sold to satisfy a judgment entered in favor of defendant is insufficient where it neither shows under what process the property was sold, nor whether there was any order or process authorizing the sheriff to sell the same, nor that any process was ever returned into court.

3. *Same.*—An attachment will not sustain a plea of justification under process in trespass for the wrongful taking of the goods, where the record of the proceedings under which the justification is claimed shows that the levy was quashed under claim of exemption.

4. *Same; Evidence.*—Where the defendant justified on the ground of a fraudulent sale to plaintiff, and an attachment, and plaintiff was in business for himself, whether he received any part of his stock from his wife was immaterial as not tending to show that he was without means to purchase the stock alleged to have been wrongfully taken.

5. *Same; Identification of Subject-Matter; Instruction.*—Where the action was in trespass for the wrongful taking of a stock of goods, a charge asserting that if the jury believe that at the time plaintiff purchased the goods, the subject of this suit, one R. owed him a bona fide debt in satisfaction of which plaintiff purchased said stock of goods, they should find for plaintiff sufficiently shows that the goods were those purchased by plaintiff from R., especially where the whole subject of the litigation was as to the validity of that sale, even though defendants claimed that all of plaintiff's goods were liable to the levy of the attachment, by reason of a wrongful intermingling.

6. *Appeal and Error; Harmless Error; Pleading.*—Where defendant got the benefit, under other pleas, of the facts alleged in the plea to which demurrer was sustained, the sustaining of such demurrer was harmless.

7. *Same; Evidence.*—It is harmless error to permit the introduction of evidence immaterial to the issues, as a general rule.

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8. *Same*.—Where the witness answers that he did not know, any error in permitting the question was harmless.

9. *Same; Plea; Effect of Evidence*.—The court on appeal cannot look to a plea in determining the correctness of the action of the trial court on the evidence, where such plea was not filed until after such evidence had been offered and rejected.

10. *Fraud; Pleading; Necessity*.—The rule is that facts constituting the fraud must be alleged with particularity, and where the pleader undertakes to state the facts, they must show fraud; but where the issue at law is as to the title to real or personal property under a claim that the title of one of the parties was obtained by fraud, the facts constituting the fraud need not be alleged with the same particularity required by a bill in chancery to cancel such a conveyance.

11. *Fraudulent Conveyance; Defenses; Pleas*.—Under the provisions of section 4293, Code 1907, a mere attempt to sell and convey a stock of goods, and their consequent removal to the storehouse of the purchaser, and intermingling with other goods, is not fraudulent and will not avoid the sale.

12. *Same; Insolvency of Transferrer*.—A debtor may prefer a creditor and sell his property to him for a fair consideration in payment of an existing debt, though he is insolvent, and that fact be known to the purchaser; hence, in trespass for the taking of a stock of goods, justified upon the ground of a fraudulent sale, and an attachment, questions as to the insolvency of the seller and as to his informing the purchaser thereof, are immaterial, and properly excluded.

13. *Trial; Order of Proof*.—Where the action was for trespass for taking a stock of goods, a statement by defendant's counsel that he proposed to show that the plaintiff married stock of goods, and continued in business, was properly excluded as unintelligible.

14. *Charge of Court; Assumption of Fact*.—Where there was no conflict in the evidence as to the fact of the purchase, the only question being as to its validity, a charge is not rendered improper in assuming that the goods had been purchased, especially where it based a finding of that fact as one of its hypotheses.

APPEAL from Blount Circuit Court.

Heard before Hon. J. T. BLACKWOOD.

Action by W. A. Harris against the Southern Cotton Oil Company and others. From a judgment for plaintiff, defendants appeal. Affirmed.

The action was for wrongfully taking a stock of goods, wares, and merchandise of the plaintiff, located at the storehouse of the plaintiff at Gum Springs, in Blount county, Ala. The following are the pleas discussed in the opinion: (3) "For further answer to

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said complaint the defendants say that on the 3d day of January, 1908, the defendant the Southern Cotton Oil company instituted suit in the circuit court of Blount county, Ala., for the sum of \$800, evidenced by a note executed by said J. W. Ratliffe, and payable to said Southern Cotton Oil Company, and in aid of said suit said Southern Cotton Oil Company sued out an attachment out of said circuit court and placed same in the hands of the defendant W. E. Graves, as sheriff of Blount county, Ala., and was by him levied upon the property mentioned in said complaint as the property of said J. W. Ratliffe; and plaintiff alleges that said property was, at the time of the levy of said writ of attachment, the property of said J. W. Ratliffe, and that the said plaintiff had no title thereto as against the plaintiff in said attachment." (4) "For further answer to said complaint defendants say that on the 3d day of January, 1908, the defendant the Southern Cotton Oil Company instituted suit in the circuit court of Blount county, Ala., against one J. W. Ratliffe, upon a note executed by said Ratliffe to said Southern Cotton Oil Company for the sum of \$800, and in aid of said suit procured an attachment to be issued by the clerk of said circuit court, which said writ of attachment was levied by the sheriff of Blount county upon the property mentioned in the complaint as the property of said Ratliffe, for the satisfaction of the debt, the foundation of the said suit, and said property was sold by the said W. E. Graves, as the sheriff of Blount county, and the proceeds thereof applied to the satisfaction of the judgment rendered in said court in said suit in favor of the said Southern Cotton Oil Company, and against the said J. W. Ratliffe; and defendants allege that for some time prior to the levy of said attachment, and up to within a few days before said levy,

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the said J. W. Ratliffe was engaged in the mercantile business in said county, and within a few days before said levy attempted to sell and convey the stock of goods belonging to said Ratliffe to the plaintiff in this case, and the said stock of goods was removed from the storehouse of said Ratliffe to the storehouse of the plaintiff, and there intermingled with other goods in the storehouse of plaintiff for the purpose of destroying their identity, and for the purpose of hindering, delaying, or defrauding the creditors of said Ratliffe; and defendants allege that said attempted sale was void, and passed no title to said property to the said W. A. Harris as against the creditors of the said Ratliffe."

The demurrers were that the plea fails to describe the suit upon which said writ of attachment was issued, fails to show that the writ of attachment was ever returned into court, fails to show that said property was in any way subject to said writ of attachment, fails to describe the process under which said goods were sold with sufficient certainty, purports to be a plea setting up justification under legal process against Ratliffe, and undertakes to allege a fraudulent transfer, without stating facts constituting such a fraud.

Plea 8 was filed on August 15, 1911, during the trial of the cause, and is as follows: "Defendant says that, shortly before the levy of the writ of attachment heretofore mentioned in pleas of defendant, Warren Ratliffe, for the purpose of hindering, delaying, or defrauding the defendant, who was at that time a creditor of said Ratliffe, with knowledge on the part of plaintiff, transferred to plaintiff a certain stock of goods upon which said writ of attachment was levied, and that the plaintiff in this cause well knew all these facts, and for the purpose of aiding and assisting the said Ratliffe in perpetrating said fraud on the defendant Southern Cotton

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Oil Company received said goods, and intermingled the same with a certain stock of goods belonging to the plaintiff, and claimed all of said goods as the property of the plaintiff."

In his oral charge to the jury the court said the attachment issued January 3, 1908, is insufficient to sustain the defendant's plea of justification under process, for the reason that it was levied upon the property which had been claimed as exempt by Ratliffe by a claim of exemptions filed in the office of the judge of probate. Therefore the levy in the first instance was wrongful, and constituted a trespass, if nothing else appeared.

The following is charge 1, given at the request of the plaintiff: "If the jury believe from the evidence in this case that at the time plaintiff purchased the goods, the subject of this suit, Warren Ratliffe owed him a bona fide debt of about \$1,000, and that plaintiff purchased said stock of goods from the said Ratliffe in satisfaction of said indebtedness, and that the amount of said indebtedness was a fair and adequate price for said goods, and that under said sale the said Ratliffe was to receive no benefit from said transaction, except the cancellation of said indebtedness, then your verdict must be for the plaintiff for the value of the goods at the time of the taking, with interest to date." The disputed question seems to be whether or not the stock of goods levied upon was that purchased by Harris from Ratliffe, and as to Ratliffe's solvency at the time, and Harris' knowledge thereof, and as to whether Harris was attempting to assist Ratliffe in covering up, or whether his purchase was for a bona fide debt owing him by Ratliffe. The other facts sufficiently appear in the opinion of the court.

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F. E. ST. JOHN, and STEINER, CRUM & WEIL, for appellant. The court erred in sustaining demurrer to plea 3 and 4.—*Gillespie v. McClesky*, 160 Ala. 289. The court erred in excluding evidence that the stock of goods originally belonged to appellee's wife, and that the goods obtained from Ratliffe, were carried and intermingled with them.—*Nelms v. Steiner*, 113 Ala. 562; 14 A. & E. Enc. of Law, 505; 20 Cyc. 777. Evidence touching the financial ability of the grantee was also admissible on the question of fraud.—*Boyland v. Mayo*, 8 Ala. 104; *Axlebaum v. Bell*, 91 Ala. 331; *Thompson v. Tower M. Co.*, 104 Ala. 140. Any evidence tending to show that grantee knew of grantor's indebtedness or insolvency at the time of the conveyance, was admissible.—20 Cyc. 780. The court erred in permitting the sheriff to state whether he gave notice of the second levy.—*Armstead v. Thompson*, 91 Ala. 130. On the same authority the court erred in its oral charge in stating that the attachment did not support the plea of justification.

WARD & WEAVER, for appellee. The lower court did not err in sustaining appellee's demurrer to appellant's plea numbered 3.—*Daniel v. Hardwick*, 7 South. Rep. 188; *Womack v. Bird*, 63 Ala. 500; *Olmstead v. Thompson et als.*, 8 South. Rep., 755. But if the trial court did err in sustaining the demurrer to plea numbered 3, it was error without injury as the defendants had the full benefit of the defense under defendants' pleas numbered 5, 6, and 7.—*Martin v. Butler*, 20 South. Rep., 352. Any error in sustaining objection to a question is cured by the court subsequently allowing the witness to testify to substantially the same matter.—*Guarino v. State*, 157 Ala. 17; *B. R., L. & P. Co. v. King*, 149 Ala. 504. The lower court did not err in

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sustaining appellee's demurrer to appellants' plea numbered 4.—Authorities supra; *Phoenix Co. v. Moog*, 78 Ala. 284. The lower court will not be reversed where the error complained of is harmless or where the record does not show that injury resulted to appellant because of the ruling.—*So. Ry. Co. v. Cunningham*, 152 Ala. 147. The appellants' twentieth assignment of error is untenable.—*Brown v. Johnson Bros.*, 135 Ala. 608.

SIMPSON, J.—This action is in trespass, by the appellee against the appellants, for wrongfully taking a stock of goods, wares, and merchandise.

Plea 3, besides being confusing in alleging that the "plaintiff" alleges the property to be the property of J. W. Ratliffe, is subject to the grounds of demurrer that it does not describe the suit, etc., with sufficient certainty (not stating against whom the suit was), and fails to show that the writ of attachment was ever returned into court.—*Olmstead v. Thompson*, 91 Ala. 130, 8 South. 755; *Daniel v. Hardwick*, 88 Ala. 557, 7 South. 188; *Womack v. Bird*, 63 Ala. 500.

Moreover, the defendants had the benefit of the facts attempted to be set up in said plea by pleas 5, 6, and 7. There was no reversible error in sustaining the demurrer to said third plea.

The demurrer to plea 4 was properly sustained. Said plea does not show under what process the property was sold, nor whether there was any order or process authorizing him to sell the same, nor that any process was returned into court.

It also undertakes to state the facts constituting the fraud, and the facts stated do not show fraud. While, in a case at law, in which the issue is as to the title to real or personal property, one party claiming

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that his title is superior to that of the other because the other's was acquired under a fraudulent conveyance, it is not necessary to allege in the pleadings the facts constituting the fraud with the same degree of particularity that is requisite in a bill in chancery to cancel a conveyance, this being a matter of proof on the issue of title vel non (*Pollak v. Searcy*, 84 Ala. 259, 261, et seq., 4 South. 137; *Moore, Marsh & Co. v. Penn & Co.*, 95 Ala. 200, 202, 10 South. 343; *Montgomery, Dryer & Co. v. Bayliss*, 96 Ala. 342, 11 South. 198; *Teague, Barnett & Co. v. Bass*, 131 Ala. 422, 426, 31 South. 4; *Gunn v. Hardy, et al.*, 130 Ala. 642, 652, 31 South. 443; *Reed v. Smith*, 14 Ala. 380; *Gilliland v. Fenn*, 90 Ala. 230, 8 South. 15, 9 L. R. A. 413; *High et al. v. Nelms*, 14 Ala. 350, 48 Am. Dec. 103; *Mason v. Vestal*, 88 Cal. 396, 26 Pac. 213, 22 Am. St. Rep. 310; Code, § 4293), yet, when the pleader undertakes to state the facts, the facts must show fraud.—³ *Mayfl. Dig.* p. 886, and cases cited.

There is nothing in the case of *Gillespie v. McClesky*, 160 Ala. 289, 49 South. 362, in conflict with this statement. In that case the plaintiff was claiming under a mortgage, fraudulent on its face—the pleadings are not all set out—and, after discussing the points on pleadings and charges, the court merely states that “there is another principle, which is brought out by some of the pleadings,” which is conclusive of the general proposition that the plaintiff could not recover in any event. The court did not discuss at all what was a necessary averment on that issue.

There was no error in the action of the court in regard to the statement by counsel for defendants that he “proposed to show that Mr. Harris married stock of goods and continued in business.” The question is unintelligible. It was probably intended to bring out the facts treated of in subsequent questions.

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The subsequent questions as to whether the witness' wife had a stock of goods when he married her, and whether he started business on that stock of goods, were objected to, and the objections sustained. In this there was no error. It is not disputed that the witness was in business himself, and as to whether he got the goods from his wife to start business on was a question between him and his wife, and had no bearing on the questions as to whether he had purchased the goods in question from Ratliffe. The fact that he got a stock of goods from his wife has no tendency to show that he had no means.

There was no error in sustaining the objections to the questions to the witness, Ratliffe, as to his insolvency and as to his informing the plaintiff of his condition. It has long been the law of this state that a debtor has a right to prefer one creditor, and that though he be insolvent, and though that fact be known to the purchaser, he may sell his property for a fair consideration to his creditor, in payment of an existing debt. Consequently the matters were irrelevant in this case.—*Crawford et al. v. Kirksey et al.*, 55 Ala. 282, 293, 28 Am. Rep. 704; *Danner & Co. v. Brewer & Co.*, 69 Ala. 200; *Spira v. Hornthall, W. & W. Co.*, 77 Ala. 145; *Tryon et. al. v. Flournoy & Epping et al.*, 80 Ala. 325; *Carter Bros. & Co. v. Coleman et al.*, 84 Ala. 258, 4 South. 151.

Plea 8 was not filed until after this testimony was offered, and, without deciding whether that plea raised any issue, it cannot be looked to in determining the correctness of the court's action in this particular.

As to the overruling of the objection to the question to the witness Graves (the sheriff), as to whether he had given the plaintiff notice of the second levy, there was no reversible error. The matter was immaterial

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to the issues in this case, and, at any rate, the answer was that the witness did not know.—*Brown v. Johnston Bros.*, 135 Ala. 609, 613, 33 South. 683.

There was no reversible error in that part of the court's oral charge to the effect that the attachment issued January 3, 1908, was not sufficient to sustain the defendant's plea of justification under process. The record of the proceedings, under which the justification is claimed, shows that the levy was quashed under claim of exemptions, and it is difficult to see how such a record could support the claim that the property was subject to the levy.—*Daniel v. Hardwick*, 88 Ala. 557, 7 South. 188.

While charge 1, given at the request of the plaintiff, possibly might have been expressed with more strict accuracy, yet the words, "the goods the subject of this suit," evidently refer to the goods purchased from Ratliffe by Harris, as the whole subject of the litigation is as to the validity of that purchase, although the defendants do claim that the whole stock of goods in the store is liable to the levy by reason of the purchased goods having been mingled with the others. As to assuming the fact that the goods had been purchased, there is no conflict in the evidence on that subject. All the witnesses who testify on that subject agree that they were purchased, the only question being whether the purchase was valid. Also the subsequent part of the charge requires the jury to find "that plaintiff purchased said stock of goods," etc.

The judgment of the court is affirmed.

Affirmed. All the Justices concur, save DOWDELL, C. J., not sitting.

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Wildman v. Evans Brothers Construction Co.. *et al.*

Trespass to Land.

(Decided January 16, 1912. Rehearing denied February 15, 1912.
57 South. 831.)

1. *Trespass; Reversal; Trespass After Warning.*—Under section 4756, an entry to remove a building under the sale, which entry was accomplished in a reasonable manner, and with due regards to the rights of the occupant cannot be considered a violation of the criminal statute denouncing trespass after warning, nor will the subsequent reversal of the judgment giving the lien relate back so as to make the entry a trespass, where such judgment had not been superseded on appeal.

2. *Mechanics' Lien; Sale of Building; Entry to Remove; Expiration of Lease.*—No exception is made by section 4756, Code 1907, where the entry and removal were after the lease had expired, and the premises had passed into the possession of the owner or another lessee, and the happening of such an event would not render the purchaser a trespasser.

3. *Same; Enforcement; Redemption; Who May Redeem.*—Under sections 4756 and 4757, Code 1907, the lessor may, by payment of the amount secured, retain the building before sale to enforce the lien, or after sale by paying the value of the building, but this gives the right only to the lessor that he may preserve the premises in their improved condition, and a lessee with no showing of special authority is without right to redeem.

APPEAL from Birmingham City Court.

Heard before Hon. C. C. NESMITH.

Action by Thomas H. Wildman against Evans Brothers Construction Company, and others, for damages for trespass to land by entry and removal of building. Judgment for defendant and plaintiff appeals. Affirmed.

FRED S. FERGUSON, and STERLING A. WOOD, for appellant. Any person injured by the criminal act of another has his action for damages caused by the criminal act.—*Miller-Brent L. Co. v. Stewart*, 166 Ala. 657; *Morris v. McClellan*, 169 Ala. 90; *Smith v. Gafford*, 31

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Ala. 45; 3 Main. 458; 67 Mass. 83. The act of defendant was criminal under section 2454, Code 1907.—*Davis v. The State*, 146 Ala. 120. Section 4757, Code 1907, is a remedial law and must be liberally construed, and cannot have the effect of robbing the plaintiff of his right of action, nor can section 4727, serve to render the act justifiable.—*Brunson v. The State*, 140 Ala. 201. The offer to pay the value of the house completely defeated the defense attempted to be set up. While the judgment is not superseded, it was reversed, and had the effect of destroying the lien under which justification is sought, and neither the sheriff's deed nor a perfect title would justify a going upon the premises after the warning.—*Marbury L. Co. v. Lamont*, 169 Ala. 33; *Arrington v. The State*, 168 Ala. 143; *Randle v. The State*, 155 Ala. 121; *Bright v. The State*, 136 Ala. 139. The right given the lessor to pay the holder of the lien the value of the house implies the duty of the latter to accept the payment or to refrain from destroying the building.—97 Md. 480; 98 Ill. App. 304; *Goodson v. Steuart*, 154 Ala. 660.

A. LATADY, for appellee. The defendant was justified in his action by the right given by the statute to remove the building.—Section 4756, Code 1907; *Zimmerman Mfg. Co. v. Daffin*, 149 Ala. 381; *Burns v. Campbell*, 71 Ala. 271; *Street v. Sinclair*, 71 Ala. 110. The cases cited relative to trespass after warning have absolutely no application. Section 4757, does not give the right to redeem to the lessee, but only to the lessor. The judgment was not superseded and its reversal did not relate back so as to defeat the lien, and hence, it was admissible as showing defendant's right.—*McDonald v. Mobile L. Co.*, 85 Ala. 358. In trespass, a defense based on legal authority must be specially pleaded, not-

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withstanding it may be shown under the general issue in mitigation of damages that a defendant supposed the authority to be valid, when it was invalid.—*Barrett v. City of Mobile*, 129 Ala. 179; *Stevenson v. Wright*, 11 Ala. 579; *Boggan v. Bennett*, 102 Ala. 400; *Womack v. Bird*, 63 Ala. 500; s. c. 51 Ala. 505.

SAYRE, J.—Appellant sued appellees in an action of trespass to land. In the second count of his complaint he added to the Code form for such cases an averment that the alleged trespass was committed after defendants had been warned in writing not to go upon the premises. Appellees defended on the ground that the Evans Bros. Construction Company had recovered a judgment in a court of competent jurisdiction against Louis B. Lavergne, as administrator of L. N. Archer, deceased, who had been in possession under a lease from the owner, by which judgment a lien was declared in the company's favor upon the building described in the complaint and the unexpired term of Archer's lease of the premises; that he had bought the unexpired term and the building at execution sale had for the satisfaction of his judgment; and that thereafter the defendant Evans acting as the agent of the company, and electing to remove the building from the premises, as provided by section 4756 of the Code of 1907, had entered for that purpose, and had removed the building to the same extent exactly as alleged in the complaint, as he had a right to do, and that without this defendants were guilty of the wrong and injury complained of by the plaintiff. If so much of section 4756 as provides that the purchaser in such case, "may, within sixty days after the sale, remove such building or improvement from the premises," is to be given effect, it means that the purchaser, in a reasonable manner and in the due

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observance of the rights of the occupants, may enter and remove the building or improvement. "*Nullus videtur dolo facere qui suo jure utitur.*" The fact that defendants had been warned not to go upon the premises puts no different aspect upon the rights of the parties. The statute conferring the lien and right to remove gave defendants legal cause or good excuse for entering, so that they did not thereby violate the criminal statute against trespass after warning. And this was the view taken by the court below.

By special replications plaintiff sought advantage of several matters in avoidance of the defense interposed. He set up that the judgment under which the construction company claimed a lien, and in execution of which it had bought the building, had been reversed and annulled by the Supreme Court. 166 Ala. 289, 52 South. 318. But the fact appeared to be, and nothing to the contrary was averred in the replications, that the judgment was reversed after the trespass complained of. That judgment had not been superseded on appeal, and, though the appeal was pending at the time, plaintiff there, defendant here, was entitled to have it executed, and by purchasing the building became vested with the right afforded by section 4756 of the Code, subject to the right of defendant in that case to restitution in the event of a reversal. In entering for the reasonable assertion of rights conferred by the judgment while yet it was in force and unreversed, defendant company and its agent were not guilty of a trespass, even though the leasehold of the defendant had expired and the premises had passed into the possession of the owner of the fee or another lessee. No exception is made of the purchaser's right in such case, nor can we ingraft exception upon the statute.

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Plaintiff also sought to show that, after the sale, he had tendered to the defendant company the value of the building as provided by section 4757 of the Code of Alabama. But section 4757 of the Code gives that right to the lessor, because, no doubt, presumably he is the owner of the premises and interested in preserving the premises in their improved condition. Plaintiff had no right under the statute as against the defendant, and in tendering the value of the building was a volunteer. Nor did the averment of the third special replication that plaintiff made the tender "as the representative of the lessor" put a different aspect upon the case. The context goes to show that plaintiff's claim to represent the lessor was grounded upon the fact that he (plaintiff) was at the time lessee of the premises, nor does it otherwise appear in the replication that plaintiff had authority to act for the lessor except as a lessee may act for his lessor by virtue of the relation without more. The plaintiff's replication did not put him within the statute. Certainly the plaintiff had no right under the statute nor by any principle of general law to acquire the ownership of the building from the defendant company unless with the defendant's consent. Nor, without express power of attorney to that end or an agency to be implied from facts, the bare relation of lessor and lessee being insufficient for that purpose, could plaintiff rightfully demand that he be allowed to redeem the building for his lessor.

The trial court held to these views. The evidence as to controlling facts was without contradiction, and the court properly gave the general charge for the defendant. All else was of no consequence. The judgment was correct, and will be affirmed.

Affirmed. All the Justices concur, except DOWDELL, C. J., not sitting.

[Birmingham Railway, Light & Power Co. v. Drennen.]

Birmingham Railway, Light & Power Co. v. Drennen.

Death Action.

(Decided June 3, 1911. Rehearing denied February 17, 1912.
57 South. 876.)

1. *Negligence; Wanton Injury.*—Where an act is done or omitted under circumstances and conditions known to the person that his conduct is likely to, or will probably result in injury, and through reckless indifference to the consequences, or consciously or intentionally, he does the wrongful act or omits an act which he ought to have done, the injury inflicted is wanton.

2. *Street Railways; Injury to Traveller; Collision; Wanton Injury.*—The evidence in this case examined and held to require submission to the jury of the issues of wanton negligence, negligence and contributory negligence.

3. *Same; Instructions.*—Where a complaint stated two causes of action in different counts, against a street car company for the death of a traveller, one counting on simple negligence, and the other on wanton negligence, a charge that if the jury are reasonably satisfied that either one or the other counts was true plaintiff's case was made out, was not objectionable as directing a verdict for the plaintiff, or as ignoring pleas of contributory negligence.

4. *Same; Instructions; Form.*—Where the action was for death in a collision between decedent's carriage and a street car, a charge asserting that if the decedent pulled his horses on the track, and was guilty of contributory negligence in that regard, yet if the motorman saw the peril in time to have avoided injury by the exercise of due care, and negligently failed, after discovering the peril, to do what he could, in the exercise of due care in managing the car, and such negligence, if any, proximately caused the death, then decedent's negligence, if any, in getting into danger, would be no defense to the subsequent negligence of the motorman, even if the motorman was not guilty of wanton nor intentional wrong, was neither abstract, nor misleading.

5. *Appeal and Error; Harmless Error; Misconduct of Counsel.*—Where plaintiff's counsel, in arguing the case, referring to defendant's counsel said: "I know Hugh Morrow, and I know what I am going to say about him is true. I know that if he was on the jury trying this case, that he would render a verdict for the plaintiff in a large amount." Defendant's counsel objected and objection was sustained, but the court did not exclude the argument or reprimand counsel for using it, nor did defendant's counsel further move the court to exclude, but assigned the same as grounds for new trial. Held, that the argument was prejudicially erroneous, and that the court having failed to more forcibly exclude the same and reprimand

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mand counsel, should have granted defendant a new trial on account of same.

6. *Jury; Disqualification; Boarders.*—Where the action was by the wife for the death of the husband, and one of the jurors was a boarder at her house, which fact was unknown to defendant at the time of or before the trial, such juror was disqualified, and the fact that he sat in the case was sufficient to vitiate the verdict.

7. *Inkeepers; Boarding House.*—An inn when unlicensed is distinguished from a boarding house in that the guests of a boarding house are under an express contract at a certain rate and for a specified time, and the keeper may select the guest and fix full term, while an inn is for the entertainment of all who come lawfully and pay regularly.

(Mayfield, J., dissents in part.)

APPEAL from Jefferson Circuit Court.

Heard before Hon. A. O. LANE.

Action by Kate D. Drennen, as administratrix, against the Birmingham Railway, Light & Power Company for damages for death of her intestate, alleged to have been caused by a collision with one of defendant's cars. Judgment for plaintiff in the sum of \$7,000, and defendant appeals. Reversed and remanded.

The facts sufficiently appear from the opinion of the court. The oral charge of the court, excepted to, is as follows: "Willful injury exists where there is a purpose on the part of the party complained of to inflict the injury. Wanton injury does not necessarily include any design or purpose to injure any one; but if the person in charge of the car, which is being operated and run along a public street, knows that to run the car without stopping is liable to injure a person in front of the car, and if he is conscious of his conduct at the time, continued to run the car with a reckless indifference to consequences, without making proper efforts to stop it, or without using the means at hand to stop it, and prevent the collision, that would constitute wantonness, if the act or omission to act was the proximate cause of the injury. You see, in will-

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ful injury there must be design or purpose; whereas, to constitute wanton injury, there need not be a design to injure, but a reckless indifference to consequences, knowing at the time that the doing of certain acts, or failure to do certain acts, would result in personal injury or death, and he consciously does the act, or consciously fails to act, and such act, or failure to act, results in injury or death, that would constitute wantonness, if that act or failure to act was the proximate cause of the injury."

Charge 7 is as follows, and was given for the plaintiff: "Even if Mr. Drennen pulled his horse on the track, and was guilty of contributory negligence in that regard, yet if the motorman saw the peril in time to avoid the danger by the exercise of due care, and negligently failed after discovering the peril to do what he could in the exercise of due care in the management or control of the car, and that such negligent failure, if there was such, proximately caused the death, then the previous negligence, if any, of Drennen in getting into danger, would be no defense to such subsequent negligence of the motorman, even if the motorman was not guilty of any wantonness, nor of any intentional wrong."

TILLMAN, BRADLEY & MORROW, for appellant. The court erred in its oral charge to the jury on the question of wantonness, and in giving the charges requested by plaintiff.—*L. & N. v. Brown*, 121 Ala. ; 11 Enc. P. & P. 183. The written charges requested by defendant should have been given.—*B. R., L. & P. Co. v. Randle*, 43 South. 355; *A. G. S. v. Burgess*, 119 Ala. 550; *M. & M. R. R. Co. v. Blakey*, 59 Ala. 470. The court should have granted a new trial because of its failure to exclude remarks of counsel, and to reprimand him.—*E. T. V. & G. v. Bayliss*, 75 Ala. 470; *Woolf v. Minnis*, 74

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Ala. 386; *Florence C. & I. Co. v. Fields*, 104 Ala. 472; *Anderson v. The State*, 104 Ala. 84. John Taylor was not an impartial juror, and the fact that he sat in the case vitiated the verdict.

BOWMAN, HARSH & BEDDOW, for appellee. The evidence justified the submission of the question of wantonness to the jury.—*So. Ry. Co. v. Shelton*, 136 Ala. 214; *Ensley Ry. v. Cheuning*, 93 Ala. 24; *L. & N. v. Trammell*, 93 Ala. 350. Counsel discuss other assignments of error, but without citation of authority.

MAYFIELD, J.—Appellee, as administratrix, sued appellant street car company, under the homicide statute, to recover damages for the wrongful death of her intestate, who was her husband.

The complaint contained two counts; one charging simple negligence, and the other wantonness. The gravamen of the complaint is that the motorman in charge of the defendant's car, either negligently, as charged in the first count, or wantonly or intentionally, as charged in the second, caused the car to run against a buggy in which the intestate was riding, thus throwing him from the buggy, or causing him to jump therefrom, and thereby killing him.

The deceased, on the day of the fatal injury, was driving in a buggy on the north side of Avenue F., in the city of Birmingham, going in an easterly direction towards Avondale, while the defendant's car was proceeding in the opposite direction along the same avenue, and when at a point between Twenty-Second and Twenty-Third streets the horse of the deceased became frightened and unruly, and while deceased was attempting to control the animal the buggy was run into by the street car, or ran against the car.

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The evidence is conflicting as to the exact manner of the collision; that is to say, whether the car was standing still at the time, and was struck by the buggy, or whether the car ran into the buggy. Some of the evidence shows that the car moved about six inches after the collision, and other evidence that it moved three or four feet, and still other that it moved six or eight feet. There was testimony tending to show that the deceased pulled the horse across the track in front of the car, or that the horse, becoming unmanageable, went across the track in front of the car, while deceased was trying to prevent it from so crossing. The deceased either was thrown, or jumped, from the buggy at the time of the collision, and it was from this fall that he received the injuries that caused his death.

The substance and effect of the testimony of the first witness for plaintiff, a negro woman named Willie Brown, was that she witnessed the collision and accident; that just before and at the time of the accident the motorman in charge of the car was looking backward, and therefore could not and did not see the deceased nor know of his peril. For what purpose he was looking backward was not made to appear by her evidence; and it should be said that her testimony here is contradicted by all the other witnesses. Moreover, she puts the deceased on the side of the track opposite to that indicated in the testimony of other witnesses, and stated that the deceased pulled the horse across the track to avoid meeting an automobile. None of the other witnesses testify to seeing an automobile, or to the circumstances of the crossing of the track. She says that the car did not slow up, because the motorman was looking backward. She does not say how far the car moved, after striking the buggy; but her testimony tends to show that the deceased pulled the horse across

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the track in front of the car. Many of the witnesses say that the horse was shying or attempting to run, and that deceased was trying to keep it off the track at the time of the collision.

Another witness, Mrs. Connybear, testifies that she did not see the car strike the buggy; that when she first saw it the car was pushing the buggy toward Twenty-Fourth street, and went three or four feet. She does not attempt to show how close the car was to deceased when he went upon the track.

Another witness for the plaintiff, Mrs. Massey, testifies that she was in her house near the scene of the accident, and that she reached her door just in time to see the collision; that the car pushed the buggy about three feet.

Nellie Luna, another witness, testifies that the car had stopped when she first saw it, and that she did not see the collision.

Another witness for the plaintiff, Ed Shriver, testifies that he did not see the collision, but witnessed some of the circumstances; that the car was running at a moderate speed, he being in it, and that he did not see the buggy, until the collision; that he did not feel any crash, but only the usual sensation of a stopping car.

The defendant's witness Erhart testifies that the car was standing still, and that the buggy collided with it. Another witness, Hunter, testifies that the horse was trying to cross the track; the car being within six feet of it. Another witness testifies that he saw the horse jump across, about six feet in front of the car, and that the buggy hit the end of the car just about the time it got on the track.

Another witness, Miller, testifies that the horse shied across the track, and that the car was stopped after it

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pushed the buggy about six inches, and that the horse was about 15 or 20 feet from the car.

Witness M. F. Oeser testified that the crash and the stopping of the car occurred at the same time, and that deceased was about 10 yards in front of the car when he fell.

The testimony of the witness Parker, the motorman, is to the effect that he noticed the deceased coming up the avenue, but not on the track, and that as the horse got closer to the car it became frightened at something on the sidewalk, and attempted to cross the track, the deceased trying to prevent this; and that he (the motorman) attempted to slow up the car as soon as he saw that the horse was trying to cross the track; that the car was still when the buggy struck it, and that the left hind wheel was knocked off; that the horse was going very fast; that the car was stopped by the time the horse was within 15 or 20 feet of it; that he had time to stop the car, but not to back it.

We do not find any evidence in this record, standing alone, or connected with all the other evidence, which would justify the trial court in submitting the question of wanton negligence or willful injury under the second count, which ascribed the injury to the wantonness, or willfulness of the motorman. While some of the evidence may tend to show simple negligence on the part of the motorman, we find none showing, or even tending to show, wanton negligence or willful injury, as has been defined by this court. The most that any of it shows or tends to show is that he was looking backward, and therefore failed to observe the danger to which the deceased was exposed, or to know and appreciate the danger of not stopping the car. There is nothing to show that his looking backward was wanton, or to justify any inference that it was with the intent

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to injure the deceased or any one else. The most that this or any other evidence shows is simple negligence, or failure to observe due care. Other evidence shows that he failed to sound the gong, or to give warning of the approach of the car; but this, at most, was simple negligence, and all the other evidence shows or tends to show that he did attempt, as best he could, to prevent the injury, after becoming aware of the danger and peril of the deceased.

It follows, therefore, that the court should have given the affirmative charge for the defendant, as requested, as to the count charging wantonness or willful injury. Wanton negligence or willful injury has been often defined by this court; and those phases of it applying to this case have been stated by this court as follows:

When an act is done or omitted under circumstances and conditions, known to the person, that his conduct is likely to or probably will result in injury, and through reckless indifference to consequences, or consciously and intentionally, one does a wrongful act, or omits an act which he ought to have done, the injury inflicted may be said to be wanton. In such cases, it is, however, essential that the act done or omitted should be done or omitted with a knowledge and present consciousness that injury would probably result; and this consciousness is not to be implied from a mere knowledge of the dangerous situation.—*M., J. & K. C. R. C. Co. v. Smith*, 153 Ala. 127, 45 South. 57, 127 Am. St. Rep. 22.

In order that one may be held guilty of willful or wanton conduct, it must be shown that he was conscious of his conduct and conscious, from his knowledge of existing conditions, that injury would likely or probably result from his conduct, and that, with reck-

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less indifference to consequences, he consciously and intentionally did some wrongful act, or omitted some known duty, which produced the injurious result.—*Montgomery St. Ry. Co. v. Rice*, 144 Ala. 610, 38 South. 857.

Before one can be convicted of wantonness, the facts must show that he was conscious of his conduct, and conscious from his knowledge of existing conditions, that injury would likely result from his conduct; that, with reckless indifference to consequences, he consciously and intentionally did some wrongful act, or omitted some known duty, which produced the injury.—*Peters v. Southern Ry. Co.*, 135 Ala. 537, 33 South. 332. See *M. & C. R. R. Co. v. Martin*, 117 Ala. 367, 23 South. 231; *Burson v. L. & N. R. R. Co.*, 116 Ala. 198, 22 South. 457; *Birmingham Co. v. Bowers*, 110 Ala. 328, 20 South. 345.

Where there is no evidence of knowledge on the part of the engineer of the presence or peril of the person on the track, or knowledge from existing conditions at the time and place of the accident that injury would likely or probably result to such person from the speed at which the engineer was running the train, he could not be said to be guilty of wanton negligence.—*Peters v. Southern Ry. Co., supra*.

The running of a train at a dangerous rate of speed through an incorporated city or town, or across a public highway along which persons in large numbers are continually passing, and without sounding the whistle or ringing the bell, or giving any alarm, does not necessarily involve an intention to kill, or such reckless disregard as to probable consequences as to amount to wantonness.—*L. & N. R. R. Co. v. Mitchell*, 134 Ala. 266, 32 South. 735; *L. & N. R. R. Co. v. Orr*, 121 Ala. 489, 26 South. 35.

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It is only after those who are operating a train fail to exercise reasonable care to avoid injuring a trespasser, after he is discovered and his peril becomes apparent, that they are held to be guilty of wantonness or recklessness, such as to overcome contributory negligence of the trespassers.—*L. & N. R. R. Co. v. Mitchell*, 134 Ala. 266, 32 South. 735; *Haley v. K. C., M. & B. R. R. Co.*, 113 Ala. 649, 21 South. 357.

It is essential, to constitute wanton negligence, that the act done or omitted should be done or omitted with a knowledge and a present consciousness that injury will probably result, and this knowledge is not to be implied from mere knowledge of elements of the dangerous situation.—*L. & N. R. R. Co. v. Brown*, 121 Ala. 221, 25 South. 609; *Burgess' Case*, 114 Ala. 587; 22 South. 169; *Markee's Case*, 103 Ala. 160, 15 South. 511, 49 Am. St. Rep. 21; *Swope's Case*, 115 Ala. 287, 22 South. 174; *Burgess' Case*, 116 Ala. 509, 22 South. 913.

A mere error of judgment, or omission to act, without more, cannot rise to the degree of wanton negligence or willful wrong.—Authorites supra; *Georgia Pac. R. Co. v. Lee*, 92 Ala. 272, 9 South. 230; *Louisville & N. R. Co. v. Webb*, 97 Ala. 308, 12 South. 374; *Highland Avenue & Belt R. Co. v. Sampson*, 91 Ala. 560, 8 South. 778.

When a person is killed on the side track by a back-ing train moving at the rate of from three to six miles per hour, the fact that a proper lookout was not kept, or that the bell was not rung, held, as a matter of law, not to be wanton negligence.—*L. & N. R. R. Co. v. Richards*, 100 Ala. 366, 13 South. 944.

On further consideration of this case, on the application for a rehearing, the majority of the court are of the opinion that the trial court did not err in submit-ting the question of wantonness to the jury, and there-

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fore do not agree to what is said by the writer on the subject of wantonness. The writer, however, adheres to the views above expressed upon this subject. He has read the evidence—every word of it—and he fails to find any tendency therein to show wantonness; and the only evidence he finds, tending to show simple negligence, is that going to show that the motorman was looking backward, and not forward, when the accident occurred. This would repel any idea of wantonness or willfulness, and show, at most, but inattention. There is, in his opinion, not a syllable of the other testimony that tends to show negligence, and nothing in the entire evidence, excepting this testimony as to the motorman's looking backward, but what would show the accident to have been an unavoidable one, for which no one would be liable. The questions of simple negligence on the part of the motorman, and contributory negligence on the part of the deceased, were matters for the jury. The court did not err in submitting these questions to the jury, nor in declining to instruct the jury affirmatively for the defendant upon these issues.

We find no reversible error in those parts of the oral charge to which exceptions were reserved by defendant. They assert correct propositions of law, and when, referred to the whole charge of which they are parts, we cannot say that they were misleading, certainly not so, to the extent to justify a reversal. The defendant could and should have requested explanatory instructions which would have cured the charges of any possible misleading tendencies.

There was no error in charging the jury that, if they were reasonably satisfied from the evidence that either one or the other of the counts of plaintiff's complaint is true, then plaintiff's case is made out. This is undoubtedly the law, as has been many times said by this and

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other courts. It did not request a verdict for plaintiff, and therefore did not ignore the pleas or defense as to contributory negligence; and, besides, the court, at the request of the defendant, gave an explanatory charge, curing it of any misleading tendency.

There was no error in giving charge No. 7. It stated a correct proposition of law, and it was neither abstract nor misleading; but, even if it were, we would not reverse for these faults, if otherwise correct. We have repeatedly ruled that there is no error in refusing charges which instruct the jury that there is no evidence of a given fact.

The bill of exceptions contains the following recitals: "Mr. Harsh, in making the closing argument for the plaintiff in the case, said to the jury: 'I know Hugh Morrow, and I know what I am going to tell you about him is true. I know that if he was on the jury trying this case that he would render a verdict in favor of the plaintiff in a large amount.' The defendant, by its attorney, Hugh Morrow, who tried the case, objected to the foregoing argument of plaintiff's counsel, and the court sustained the objection. At the time of making the objection, defendant's attorney stated to the court, in the presence of the jury, that the facts stated by Mr. Harsh were not in evidence, and were not true in substance and in fact." This was clearly and wholly illegitimate argument. It was matter stated as a fact to the jury, of which there was no evidence, and of which fact evidence would not have been admissible, if offered. Its only tendency and effect was to prejudice the jury against the defense of the defendant, and against the sincerity of its counsel in so defending. Its natural tendency was to persuade the jury to render a verdict for plaintiff, because it was practically confessed by the attorney for defendant. It would be difficult to

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conceive of argument more objectionable, unfair, and prejudicial than was this, coming, as it did, in the closing argument, to which the defendant's counsel has no opportunity to reply. Courts should not allow verdicts obtained by such argument to stand. If the trial court had been requested to exclude the argument from the jury, and had declined, there would, we think, be no doubt that the refusal would be reversible error on appeal, or that it would be ground for a new trial. The defendant's counsel did object to the argument, and the court sustained the objection, but the court did not ex mero motu exclude such argument, or reprimand counsel so using it; nor did counsel retract it after it was objected to and the objection sustained; nor did counsel for defendant, as he might have done, further move the court to exclude. This court, on appeal, can only review the actions and rulings of the trial courts, and not those of counsel; hence on the main appeal we cannot review the action of the trial court as to this matter, for the reason that his ruling, as far as invoked on the main trial, was in favor of appellant, and appellant cannot therefore assign it as error.—*Cutcliff's Case*, 148 Ala. 108, 41 South. 873; *Strong's Case*, 105 Ala. 60, 72, 17 South. 114; *King's Case*, 100 Ala. 85, 14 South. 878.

But the defendant could and did assign, as ground for new trial, this illegitimate argument of plaintiff's counsel, which argument counsel failed to withdraw, or to attempt to correct the erroneous impression it may have produced upon the minds of the jury, and the trial court declined to set aside the verdict on this account; so, as to the new trial, it may assign such action as error.

This court has repeatedly and in strong language condemned remarks of counsel less offensive and less offending than those used in this case, and has awarded

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new trials where the trial court failed or refused to take prompt and decisive action to eradicate such erroneous impressions, and has done this in cases even where counsel making such argument had done all he could to cure his error; that is, by retracting the offensive remarks.

In the case of *Wolffe v. Minnis*, 74 Ala. 286, 389, this court, by STONE, C. J., said: "We think the language complained of in this case should not have been indulged, and coming, as it did, from able and eminent counsel, it was well calculated to exert an improper influence on the minds of the jurors. The court might, and probably should, have arrested it *ex mero motu*. It is one of the highest judicial functions to see the law impartially administered, and to prevent, as far as possible, all improper, extraneous influences from finding their way into the jury box. And when opposing counsel objected to the improper language employed, and called the attention of the court to it, it was not enough that offending counsel replied, 'Oh, well, I'll take it back.' Such remark cannot efface the impression. The court should have instructed the jury, in clear terms, that such remarks were not legitimate argument, and that they should not consider anything thus said in their deliberations. Nothing short of a prompt, emphatic disapproval of such line of argument, and that from the court itself, can avert the probable mischief.—*Sullivan v. State*, 66 Ala. 48; *Cross v. State*, 68 Ala. 476." This quotation is strikingly applicable to this case.

In the case of *Florence, etc., Co. v. Field*, 104 Ala. 471, 480, 16 South. 538, 540, this court, commenting on improper remarks of counsel, speaking by Justice HARALSON, said: "On objection raised by defendant's counsel, the court said the objection was sustained, and stated to counsel making the remark that it was im-

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proper, whereupon the said counsel remarked, ‘Well, I withdraw the remark.’ There was no exception reserved by defendant to this remark of counsel, nor to the action of the court upon it. Nor is it made the basis of a motion for a new trial. It is, however, assigned as error. We have referred to it to state that the remark was calculated to seriously prejudice and injure the defendant with the jury. The action of the court in excluding it was very mild, and not a sufficient antidote to the poison that had been injected into the minds of the jury by the use of such language. Verdicts ought not to be won by such methods, and when an attorney, in the heat of debate, goes to such extraordinary lengths generally the court should promptly set aside any verdict that may be rendered for his client. The repressive powers of a court to prevent such departures from legitimate argument of a cause before a jury should be vigorously applied. No mere statement that it is out of order or improper can meet the exigencies of the case. Nothing short of such action on the part of the court, and a clear satisfaction that the prejudice naturally excited by the use of such language had been removed from the minds of the jury, ought ever to rescue a case from a new trial on motion of the party against whom rendered.”

In the case of *Tannehill v. State*, 159 Ala. 52, 48 South. 622, this court, speaking through SIMPSON, J., said: “It is the duty of the court to see that the defendant is tried according to the law and the evidence, free from any appeal to prejudice or other improper motive; and this duty is emphasized when a colored man is placed upon trial before a jury of white men. Courts in some other jurisdictions have held, on what seems to be good reason, that the injury done by such remarks cannot even be atoned by the retraction or the ruling out of the

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remarks; but at least it is error, as held by our own courts, for such remarks, stating facts that are not in evidence before the jury, to be allowed."

In the case of *Berry v. State*, 10 Ga. 511, 522, when the question was raised for the first time on motion for new trial, Lumpkin, J., made the following pungent remarks: "That the practice complained of is highly reprehensible, no one can doubt. It ought, in every instance, to be properly repressed. For counsel to undertake by a side wind to get that in as proof which is merely conjecture, and thus to work a prejudice in the minds of the jury, cannot be tolerated. Nor ought the presiding judge to wait until he is called on to interpose. For it is usually better to trust to the discrimination of the jury as to what is, and what is not, in evidence than for the opposing counsel to move in the matter. For what practitioner has not regretted his untoward interference, when the counsel, thus interrupted, resumes: 'Yes, gentlemen, I have touched a tender spot; the galled jade will wince. You see where the shoe pinches.'"

In the case of *East Tennessee, Virginia & Georgia Railroad Co. v. Carloss*, 77 Ala. 443, 448, this court, through SOMERVILLE, J., said: "As the case is sent back for a new trial on another point, we need not consider whether the exception was properly taken so as to raise this question. Circuit judges have ample power to check arguments of this character by setting aside verdicts obtained through their influence, either on motion of the adverse party or ex mero motu. If it were exercised more freely in such cases, this court would probably be troubled with reviewing fewer transgressions of the rule to which we have above referred."

We are also of the opinion that a new trial should have been awarded because of the disqualification of the

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juror Taylor, who was shown to be boarding at the house of and with the plaintiff at the time of the trial. He was either the guest, the tenant, or a member of the household of the plaintiff at the time of the trial, either of which relations would disqualify him as a juror. It was not disputed, but admitted, that this fact was unknown to the defendant or its attorney at the time of or before the trial. It could not be expected, under the circumstances shown in this case, that the juror would be disinterested and unbiased as between the parties. Here was a juror whose landlady was the plaintiff, and a witness at the trial, insisting that this defendant had wrongfully killed her husband and left her a widow. It would have been inhuman and wholly unnatural that this juror could be entirely uninfluenced by these facts. The trial lasted for several days, and he was rooming at the plaintiff's house and home during this time, and had been doing so for some time before the trial. The plaintiff certainly knew this fact before and at the time of the trial, and it is admitted that the defendant did not. The juror or the plaintiff should have disclosed this fact to the court or to the defendant, so that the juror could be challenged or excused. However honest and conscientious the juror may have been, he was not a proper juror on this trial under his existing environments. Without committing ourselves to all that Mr. Proffatt (Jury Trial, § 177, p. 231) says, we quote: "Social or business relations existing between a juror and a party to the suit render the juror incompetent. As when the juror is under the power of either party, or in his employment, or has drunk or eaten at his expense, since the commencement of the action. Hence the relation of landlord or tenant disqualifies." Mr. Thompson (Trials, vol. 1, § 67, p. 59), says: "That the venireman is the inferior or dependent in business

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relations of the opposite party to the suit will generally disqualify. Thus, if he is his surety, and the rendition of a judgment against him will diminish the probability of his being exonerated, or if he is his tenant, although distress for rent may have been abolished," etc.

While it has been held that the fact that one of the parties is an innkeeper and that one of the jurors is stopping at his inn will not disqualify him; this is quite different from a private boarding house, such as that shown in this case. The relation shown in the case at bar is much closer than that between ordinary landlord and tenant, or between the landlord and a mere patron of a public hotel. The distinction between a public inn or hotel and a boarding house is well pointed out in the case of *Foster v. State*, 84 Ala. 452, 4 South. 833, where it is said: "An 'inn' is a house of entertainment for travelers, being synonymous in meaning with 'hotel' or 'tavern.' It was formerly defined to mean 'a house where a traveler is furnished with everything which he has occasion for while upon his way.'—*Thompson v. Lacy*, 3 B. & Ald. 283; *People v. Jones*, 54 Barb. (N. Y.) 311. But this definition has necessarily been modified by the progress of time, and the mutations in the customs of society and modes of travel in modern times. An inn, however, was always, and may now, when unlicensed, be distinguished from a boarding house, the guest of which is under an express contract, at a certain rate, and for a specified time; the right of selecting the guest or boarder and fixing full terms being the chief characteristic of the boarding house, as distinguished from an inn, etc.

So, in the case of *City of Birmingham v. Birmingham Waterworks Company*, 152 Ala. 310, 44 South. 582, 11 L. R. A. (N. S.) 613, the distinction is drawn; it being there said: "The public house is for the entertainment

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of all who come lawfully and pay regularly. The boarding house is for the accommodation of those only who are accepted as guests by the proprietor. Such an establishment is as much a private house as if there were no boarders. * * *

"In a boarding house, the guest is under an express contract, at a certain rate, for a certain period of time; but in an inn there is no express engagement. The guest, being on his way, is entertained from day to day, according to his business, upon an implied contract," etc.

In the case at bar, the juror was not only a tenant of the plaintiff, but a member of her household; and it is wholly improbable that he could have been indifferent to the result of the suit. His testimony, on the motion for a new trial, while showing that he was not in favor of returning as large a verdict as some of the other jurors favored, yet shows that he resolved his doubts as to whether the case was made out in favor of the plaintiff. As to this, he says: "Yes; and my recollection is myself and two other gentlemen were the lowest gentlemen on that jury for a verdict. I took a very firm stand, as I saw the case, that I wasn't in favor of an excessive or any large verdict; in my mind, there was a question of doubt about it, and I was willing to give plaintiff the benefit of it."

We are of the opinion that the trial court should have granted the motion for a new trial, and that it was error to refuse it.

Reversed and remanded. All the Justices concur, save DOWDELL, C. J., not sitting, and MAYFIELD, J., who dissents as to the question of wantonness being for the jury.

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Action on Insurance Policy.

(Decided November 23, 1911. Rehearing denied February 15, 1912.
57 South. 852.)

1. *Insurance; Policy; Forfeiture Clause.*—The rule that insurance contracts will be strictly construed against the insurer should be especially followed as to clauses working a forfeiture.

2. *Same; Accident Insurance; Construction.*—Parts one and two of the policy stated and it is held that a death loss under such policy was expressly limited to an injury described in part one, which must have resulted necessarily and solely therefrom within 90 days after its infliction, and hence, an objection that the provisions of part one were inapplicable in case of loss by death, cannot be sustained.

3. *Same; At Once; Immediately.*—Where the policy owner is insured against bodily injuries caused through external, violent and purely accidental means, causing at once and continuously after the accident total inability to engage in any and every labor or occupation, etc., the term, "at once" or "immediately" must be construed as adverbs of time and not causation, and are not intended to mean reasonable time, but rather presently or without any substantial interval between the accident and the disability.

4. *Same; Proof of Loss; Waiver.*—Where preliminary proofs of loss are presented in due time to the insurer, defects therein may be waived by failure to object to them on that ground, or by refusing to pay for any reasons other than defects in the proof.

5. *Appeal and Error; Joint Assignment; Review.*—Unless sustainable on all grounds, a joint assignment of error will be overruled.

APPEAL from Jefferson Circuit Court.

Heard before Hon. E. C. CROWE.

Action by Lula Ogburn against the Continental Casualty Company on an accident and death policy. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Plea 6, after quoting part 1 of the contract as set out in the opinion, avers that the insured did not receive personal bodily injuries which caused at once and continuously after the accident a total inability to engage

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in any and every labor or occupation. The demurrs to this plea were that it is not shown that the provisions referred to would be operative in case of loss by death. It is affirmatively shown in said plea that the provision therein set out is not applicable in the case of death. Plea 4 sets out the policy requirement as to proof of injury, fatal or nonfatal, and avers a failure to comply therewith, with the further averment of the clause of strict compliance in said policy. The third replication to this plea sets up a waiver of the benefit of this provision, in that there was an absolute denial of liability, on the ground that the insured died of a disease, and not as the result of an accident. The seventh replication sets up that proof of death was made, and no objection was ever made to the sufficiency of such proof, but that the proof was retained without objection made within a reasonable time.

CHARLES A. CALHOUN, MANTON MAVERICK, and M. P. CORNELIUS, for appellant. The court erred in sustaining demurrs to plea 6.—*Aetna L. I. Co. v. Laster*, 153 Ala. 63; *U. S. H. & A. Co. v. Veitch*, 161 Ala. 631. The court erred in overruling defendant's demurrer to replications 3 and 7.—*Cent. C. I. Co. v. Oates*, 86 Ala. 569; *McKemie v. Forbes P. Co.*, 155 Ala. 261. The court erred in denying's defendant's motion to exclude the evidence and direct a verdict for defendant on the ground that plaintiff had failed to sustain her allegation that final proofs were filed on Sept. 13th, and on account of her total failure to show compliance with the proof requirements of the policy.—*Lee v. DeBardeleben C. & I. Co.*, 102 Ala. 628; *Ala. Nat. Bank v. Halsey*, 109 Ala. 197. It is the duty of the court to construe all writings introduced in evidence.—*Ga. H. I. Co. v. Allen*, 119 Ala. 436. Mere silence on the part of the

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insurer is not sufficient to constitute a waiver and does not constitute a fraud on plaintiff.—1 Cyc. 279; *Cent. C. I. Co. v. Oates, supra*. Counsel discuss the action of the court in overruling motion for new trial with citation of authority.

RIDDLE, ELLIS, RIDDLE & PRUET, and BLACK & DAVIS, for appellee. A joint assignment is not sustained unless all parts thereof are good.—*A. G. S. v. Clarke*, 145 Ala. 466. Part 1 has no application to an injury causing death in so far as total inability to work is concerned.—4 Cooley on Ins. 3170; 19 Fed. 63; 99 N. W. 672; Richard on Ins. 548. Denial of liability on grounds other than lack of proof is a waiver of the right to demand proof.—*Ga. Home v. Allen*, 128 Ala. 451; *Fireman's I. Co. v. Crandall*, 33 Ala. 9. Where the proofs furnished are imperfect and are held by the insurer for an unreasonable length of time without objection, or without demanding fuller and more perfect proof, it will constitute a waiver.—*Acme I. Co. v. Adler*, 71 Ala. 526; *Fire I. Co. v. Felrath*, 77 Ala. 200; *Royal I. Co. v. Taber*, 124 Ala. 681; 68 L. R. A. 285; 45 Atl. 111. The evidence of waiver established replications 3 and 6.—Authorities *supra*.

ANDERSON, J.—“Insurance policies are framed by insurance companies with great care and caution, with a view of limiting their liability as much as possible; and in most cases impose conditions and duties on the assured, to be performed with marked particularity. They should be and are liberally construed in favor of the assured, which conditions and provisions are strictly construed against the insurer.”—*Piedmont Co. v. Young*, 58 Ala. 486, 29 Am. Rep. 770. And this rule is especially followed in dealing with forfeiture clauses of

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insurance contracts.—*Equitable Co. v. Golson*, 159 Ala. 508, 48 South. 1034. On the other hand, courts are not at liberty to make new contracts for parties, and where the language is unambiguous, and but one reasonable construction of the contract is possible, the court must expound it as made, however hard it may operate on the parties; for in contracts of insurance, as in other contracts, the rights of the parties are determined by the terms of the instrument as far as they are lawful.
—1 Encyc. L. & P. 323.

Part 1 of the contract in question, being the insuring clause for accident, says: "If the insured while this policy is in force shall receive personal bodily injury (suicide sane or insane not included) which is effected directly and independently of all other causes through external, violent and purely accidental means, and which causes at once and continuously after the accident total inability to engage in any and every labor or occupation, the company will pay indemnity for loss of life, limb, limbs, sight or time resulting therefrom." Part 2, in fixing the compensation for loss of life, limb, etc., says: "If, within ninety days from the date of the accident, any one of the following losses shall result *necessarily* and *solely* from *such injury* as is described in part 1, the company will pay subject to the provisions of part 6." It then proceeds to fix the sum for loss of life, limbs, etc. It must be observed that the death loss is expressly referable to such injury as is described in part 1, and which must have resulted *necessarily* and *solely* therefrom, and within 90 days after the infliction of same; that is, the assured must have sustained an injury, through external, violent, and purely accidental means, and which *cause at once and continuously* after the accident total inability, etc., and his death must have resulted within 90 days from such an

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accident so sustained in order to entitle the beneficiary to the death claim as provided by part 2., Plea 6 is couched in the language of the policy contract, and the demurrs, which make the point that the accident as described in part 1 has no application to the death feature of the contract, should have been overruled, and the trial court committed reversible error in sustaining same. In the case of *Rorick v. Railway Officials*, 191 Fed. 63, 55 C. C. A. 369, the court held that the death clause of the policy was not controlled by the clause defining the nature and character of the accident, though there is a strong dissenting opinion by Gilbert, C. J. Whether this case is sound or not, it can be differentiated from the case at bar as the death clause there provided for "loss of life, occurring within ninety days from the date of the accident causing the fatal injury," and did not refer to the part of the policy defining the accident or requiring that death should result necessarily and solely from such injury as so described, as does the policy contract in question. As to the meaning of the injury as described, this would arise upon a construction of the plea, as it is couched in the language of the contract and was not subject to the plaintiff's demurrer.

It is sufficient to say that the terms "at once" and "immediately," as used in the accident policies, in dealing with the nature and character of the disability, have been construed by a majority of the courts as adverbs of time and not causation, and that they do not mean a reasonable time, but mean presently or without any substantial interval between the accident and the disability.—1 Encyc. L. & P. 332; Cooley's Briefs on Insurance, vol. 4, pp. 3168, 3169; *Williams v. Preferred Ass'n*, 91 Ga. 698, 17 S. E. 982; *Vess v. United Society*, 120 Ga. 411, 47 S. E. 942; *Pepper v. Order of America*, 113 Ky.

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918, 69 S.W. 956; *Merrill v. Travelers' Co.*, 91 Wis. 329, 64 N.W. 1039; *Preferred Ass'n v. Jones*, 60 Ill. App. 106; *Ritter v. Accident Ass'n*, 185 Pa. 90, 39 Atl. 1117; *Pac. Mutual Co. v. Branham*, 34 Ind. App. 243, 70 N.E. 174.

"It has been held by this and other courts that where the preliminary proofs of loss are presented to the insurer in due time, and they are defective in any particular, these defects may be waived in either of two modes: First, by a failure of the insurer to object to them on any ground, within a reasonable time after receipt; in other words, by undue length of silence after presentation. And, second, by putting their refusal to pay on any other special ground than such defect of proof. The reason is that fair dealing entitles the assured to be apprised of such defect, so that he may have an opportunity to remedy it before it is too late."—*Central Ins. Co. v. Oates*, 86 Ala. 568, 6 South. 84, 11 Am. St. Rep. 67, and cases there cited. Replications 3 and 7 to plea 4 seem to conform to the above-quoted authority and were not subject to the defendant's demurrers which were properly overruled by the trial court. Moreover, the assignment of error as to said replications was joint, and the trial court could not be reversed unless both of them were subject to the demurrers.—*A. G. S. R. Co. v. Clarke*, 145 Ala. 460, 39 South. 816. Nor can we say that the trial court erred in refusing the general charge for the defendant, upon the theory that the plea was proven and the plaintiff failed to prove said replications. The plaintiff addressed a letter to the defendant dated September 9th, which was received within 30 days after the death of the insured, informing it of the claim, death of the insured, and the cause of same, which was treated with silence. Then, too, the defendant, on September 21st (after receipt of her letter and

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within 30 days after the death of her husband), wrote her, making no allusion to said defective proof sent them or to her demand, settling with her on the disease rather than accident basis, and demanding a surrender of the policy. The jury could well infer a refusal to pay the death claim, not for failure to furnish the requisite proof, but upon the ground that the death of the assured resulted from disease and not from accident.

Since this case must be reversed, it is needless for us to determine whether or not the trial court erred in refusing a new trial because the verdict was palpably contrary to the great weight of the evidence.

The judgment of the circuit court is reversed, and the cause is remanded.

Reversed and remanded. All the Justices concur, except McCLELLAN, J., not sitting.

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Action on Guaranty.

(Decided November 30, 1911. Rehearing denied February 15, 1912.
57 South. 700.)

1. *Guaranty; Validity; Acceptance.*—Although notice of the acceptance of a mere proposed guaranty is necessary, no further acceptance was required where a guaranty contract, completely executed by the parties, recited that the sellers agreed to extend certain credit to the buyers, and that the guarantor, in consideration of a named sum in hand paid, guaranteed the payment of a certain part of the proposed indebtedness.

2. *Same; Order of Signing.*—Where the guaranty stated on its face that it was a continuing guaranty for twelve months and showed that the proposal proceeded from the creditors to the guarantor, the order in which the parties signed it was not material to its validity.

3. *Same; Consideration.*—Where a guaranty contract for the payment of a proposed indebtedness of \$1,000 recited on its face that it was made in consideration of the sum of \$5 in hand paid,

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the receipt of which was acknowledged, it was immaterial that the consideration was not actually paid.

4. *Same; Remedy of Creditor; Compromise of Indebtedness.*—Where the contract sued on provided that the creditor could compound the indebtedness with the principal debtor without in any way affecting the guaranty, a plea by the guarantor setting up a compromise whereby the principal debtor was released, but not alleging specifically that the guarantor was thereby released, was insufficient.

5. *Same; Instructions.*—A compromise between the creditor and the principal debtor without any agreement that it affect the guaranty would not extinguish the guarantor's liability, where the contract provided that the creditor and debtor could compound the indebtedness without in any way affecting the guaranty.

6. *Same; Issue for Jury.*—Where the complaint, in an action on a guaranty, averred that the creditor extended credit to the accommodated parties as stipulated in the guaranty, and the evidence for the defendant was that the creditor failed and refused to extend the credit for the full amount named, the issue thus raised was one for the jury.

8. *Alteration of Instruments; Filling Blanks; Guaranty.*—Where a guarantor signed a contract guaranteeing the payment of an indebtedness contracted with a certain firm, and a space was left for the insertion of the name of such firm, which was then not exactly known, the subsequent insertion, by the creditor, of the firm name as intended was not a material alteration of the contract.

APPEAL from Crenshaw Circuit Court.

Heard before Hon. A. E. GAMBLE.

Action by Steiner, Lobman & Frank against T. W. Shows, on a guaranty. Judgment for plaintiff on a directed verdict, and defendant appeals. Reversed and remanded.

F. B. BRICKEN, and TYSON, WILSON & MARTIN, for appellant. An undertaking of guaranty is primarily an offer, and does not become a binding obligation until its acceptance, and notice of acceptance given to the guarantor.—1 Brandt on Suretyship, sec. 205 and note 20; 20 Cyc. 1404, and note 48. The guarantor was released and the fact that it was not in writing was wholly without merit.—*Hand L. Co. v. Hall*, 147 Ala. 561. One partner may execute a release of the partnership debt.—30 Cyc. 500, note 60; *Pearson v. Hooker*, 3 Am. Dec.

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468. If the controversy was between plaintiff and the principal debtors, it would be entirely competent for the latter to show the true consideration although different from that recited.—*Henry v. Murphy*, 54 Ala. 246. The guarantor was not bound by any of the recitals in the deed of assignment, as he was in no way connected with it, and hence, could set up the release and establish its terms by parol testimony.—*B. & A. Mtg. Co. v. Cody*, 135 Ala. 622; *Robinson v. Mosely*, 93 Ala. 70. The contract of release was a valid and binding one.—*Singleton v. Thomas*, 73 Ala. 208; *Henry v. Murphy*, *supra*; 6 A. & E. Enc. of Law, 737; 9 Cyc. 311. Counsel discuss assignments of error relative to evidence and charges, but without further citation of authority.

POWELL & HAMILTON, for appellee. The contract of guaranty is absolute on its face, and is shown to have been executed by both parties, and hence, the court was without error in sustaining demurrers to defendant's pleas 1 to 10.—*Scharfenburg v. New Decatur*, 155 Ala. 654, and cases there cited. If the contract had been signed by only one party, but had been accepted and acted on by the other party, it is just as binding as if signed by both.—*Whatley v. Reese*, 128 Ala. 505; *Mooten v. L. & N.*, 128 Ala. 544. Having admitted receipt of the consideration expressed, it is immaterial whether it had been received.—*Omar v. Boyer*, 89 Ala. 278; 104 U. S. 167; 9 Cyc. 718. No notice of acceptance was necessary under these conditions.—104 U. S. 167; *Leftkowitch v. First Nat. Bank*, 152 Ala. 521. Where one signs a paper and leaves a blank with the intention that the blank be filled by the other party, this will not constitute a material alteration.—9 Cyc. 302. The court properly sustained demurrers to pleas 11, 12, E and F.

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—*Singleton v. Thomas*, 73 Ala. 207; *Crass v. Scruggs & Co.*, 115 Ala. 269; *Bank of Mobile v. M. & O.*, 69 Ala. 311; 17 Cyc. 661. Pleas A and C were not sustained by the evidence.

MAYFIELD, J.—This is an action on a contract of guaranty, which contract was in writing, and was as follows:

“Agreement of Guaranty. The State of Alabama, Montgomery County:

“This agreement, made this the 17th day of October, 1907, by and between Steiner, Lobman & Frank, a partnership, engaged in the wholesale dry goods and notion business, at Montgomery, Alabama, of the one part, and T. W. Shows, of Luverne, Alabama, of the other part, witnesseth: That whereas, the said Steiner, Lobman & Frank have agreed to supply the firm of Beall & Fundaburk, from time to time, in the course of trade, with merchandise, on credit, to the extent of twenty-five hundred (\$2,500.00) dollars, for a period of twelve (12) months from this date, provided the said Shows will enter into this agreement of guaranty; and whereas, the said T. W. Shows is willing to become guarantor to the said Steiner, Lobman & Frank, upon a line of credit extended to the said Beall & Fundaburk, as hereinafter provided: Now, therefore, in consideration of the premises and the sum of five (\$5.00) dollars, by the said Steiner, Lobman & Frank to the said T. W. Shows in hand paid, the receipt whereof is hereby acknowledged by the said Shows, the said T. W. Shows does hereby guarantee unto the said Steiner, Lobman & Frank, the payment, to the extent of one thousand (\$1,000.00) dollars of any indebtedness which the said Beall & Fundaburk may, from time to time, owe the said Steiner, Lobman & Frank, during the continuance

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of this guaranty. It is agreed that the guaranty hereby given is a continuing guaranty for twelve (12) months from the date of this instrument, and that the said Steiner, Lobman & Frank may grant time, or other indulgence, or compound with, or take additional security from the said Beall & Fundaburk, or extend credit to the said Beall & Fundaburk in excess of twenty-five hundred (\$2,500.00) dollars, without, in any way, affecting this guaranty. In witness whereof, the said parties to this contract have hereunto set their hands, the year and day first above written. [Signed] Steiner, Lobman & Frank. [Signed] T. W. Shows."

The complaint as last amended contained three counts. The first and second declared upon the contract, which was set out in full, and the third on the common counts, which last count need not be considered. Demurrers to the complaint being overruled, the defendant filed a great number of special pleas, including one of non est factum. Demurrers were sustained to most of these pleas, and the trial was had upon pleas 1, 2, 13, 14, A, and C, and two special replications to pleas A and C, which replication it is unnecessary to notice. Assignments of error from 1 to 21, inclusive, go to the sustaining of demurrers to special pleas from 3 to 10, and to pleas B and 15.

The defenses attempted to be set up in the pleas, in varying forms, may be reduced to three, which were: First, that defendant had had no notice of the acceptance of the guaranty by the plaintiffs; second, that the contract, when signed by defendant, contained blanks which were afterwards filled in, such after filling in constituting an alteration of the contract; third, that there was not sufficient consideration to support the contract, in that the defendant did not actually receive the recited consideration of \$5, and had no notice of plain-

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tiffs' acceptance of the guaranty, nor of their furnishing the credit, so as to make it a binding contract.

None of these numerous pleas, to which demurrers were sustained, was good. The three defenses attempted to be set up in them were not availings in this action. It is very true that notice of acceptance by the guaranteee of a mere proposed guaranty, such as a letter of credit, is necessary to make the undertaking binding upon the guarantor; but it is equally true and well settled that no formal or further acceptance is necessary where the guaranty, as in this case, is a bilateral contract, completely executed by both parties, reciting on its face that it is executed upon a recited, even though nominal, consideration.

The two rules are well settled by the Supreme Court of the United States, in the case of *Davis v. Wells*, 104 U. S. 159, 26 L. Ed. 686. It is there said: "In *Adams v. Jones*, 12 Pet. 207, 213 [9 L. Ed. 1058] Mr. Justice Story, delivering the opinion of the court, said: 'And the question which, under this view, is presented is whether, upon a letter of guaranty, addressed to a particular person or to persons generally, for a future credit to be given to the party in whose favor the guaranty is drawn, notice is necessary to be given to the guarantor that the person giving the credit has accepted or acted upon the guaranty and given the credit on the faith of it. We are all of the opinion that it is necessary; and this is not now an open question in this court, after the decisions which have been made in *Russell v. Clark*, 7 Cranch, 69 [3 L. Ed. 271]; *Edmondston v. Drake*, 5 Pet. 624 [8 L. Ed. 251]; *Douglass v. Reynolds*, 7 Pet. 113 [8 L. Ed. 626]; *Lee v. Dick*, 10 Pet. 482 [9 L. Ed. 503], etc.'

But it is further on, in the same opinion, said: "If the guaranty is made at the request of the guaranteee, it

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then becomes the answer of the guarantor to a proposal made to him, and its delivery to or for the use of the guarantee completes the communication between them and constitutes a contract. The same result follows, as declared in *Wildes v. Savage, supra* [1 Story, 22, Fed. Cas. No. 17,653], where the agreement to accept is contemporaneous with the guaranty, and constitutes its consideration and basis. It must be so wherever there is a valuable consideration, other than the expected advances to be made to the principal debtor, which, at the time the undertaking is given, passes from the guaranteee to the guarantor, and equally so where the instrument is in the form of a bilateral contract, in which the guaranteee binds himself to make the contemplated advances, or which otherwise creates, by its recitals, a privity between the guaranteee and the guarantor; for in each of these cases the mutual assent of the parties to the obligation is either expressed or necessarily implied."

Such were the undisputed facts in this case, appearing on the face of the complaint. The guaranty, which was set out in the complaint, recited that the proposal came from the guaranteees to the guarantor, and was accepted by him upon a recited consideration of \$5 paid, and of the proposed credit of \$2,500, to be extended to and for the benefit of a third party named therein.

Moreover, this was a continuing contract of guaranty for the term of one year; such being expressly declared in the contract. It was therefore wholly immaterial who signed the contract first, or what was the order in which the parties signed it. Hence the pleas, setting up the fact that the contract was signed by defendant first, and that he did not know that plaintiffs had signed it, were immaterial; it being shown on the face

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of the contract that the proposal proceeded from the guarantees to the guarantor.

It was likewise immaterial that the recited consideration of \$5 was not actually paid, as recited. This same question was also disposed of in the cited case of *Davis v. Wells, supra*, 104 U. S. 167, 168, 26 L. Ed. 686, in which the court said: "It is not material that the expressed consideration is nominal. That point was made, as to a guaranteee, substantially the same as this, in the case of *Lawrence v. McCalmont*, 2 How. 426, 452 [11 L. Ed. 326], and was overruled. Mr. Justice Story said: "The guarantor acknowledged the receipt of the \$1, and is now estopped to deny it. If she has not received it, she would now be entitled to recover it. A valuable consideration, however small or nominal, if given or stipulated for in good faith, is, in the absence of fraud, sufficient to support an action on any parol contract; and this is equally true as to contracts of guaranty or as to other contracts. A stipulation in consideration of \$1 is just as effectual and valuable a consideration as a larger sum stipulated for or paid."

There was nothing in the pleas which attempted to allege an alteration by the filling in of the blanks. If the facts set up in such pleas were true, they showed that the defendant was bound by the contract when the blanks were filled in. The blank to be filled in was wholly immaterial to the contract; the engagement would have been binding with the blank remaining, as it was, merely a blank for the name of the partnership to which the goods were to be furnished. The partners were known, but the exact name of the partnership had not been agreed upon; and when it was agreed upon it was inserted in the blank space. This was fully understood by all the parties. The defendant, by signing the

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contract in that condition, authorized the holder to fill in this blank when the facts were known; and hence it was as binding upon him, as a contract, as if the name had been inserted in the blank space when he affixed his signature.

"1. There are two general rules which apply to the law as to filling in blanks in written instruments: First, no one can found a title upon a forgery (7 C. B. Eng. 448; 30 L. J. C. P. 117); second, 'where a man has willfully made a false assertion calculated to lead others to act upon it, and they have done so to their prejudice, he is forbidden, as against them, to deny that assertion' (31 L. J. Ex. 436). It has been held that a deed or bond containing blanks delivered to the grantor's agent may subsequently be filled up and effectually delivered by him.—[*Gibbs & Labuzan v. Frost & Dickinson*] 4 Ala. 720; [*Duncan v. Hodges*, 4 McCord (S. C.) 239] 17 Am. Dec. 734; [*Reed v. Morton*, 24 Neb. 760, 40 N. W. 282] 1 L. R. A. 736 [8 Am. St. Rep. 247]."

"3. It has been said by the Supreme Court of the United States: 'We agree that by signing and acknowledging the deed in blank, and delivering it to an agent with expressed or implied authority to fill up the blank, perfects the conveyance, and its validity cannot well be doubted.'—[*Drury v. Foster*] 2 Wall. 24 [7 L. Ed. 780]."—6 Mayf. Dig. 86.

Pleas 11, 12, E, and F, which attempted to set up a compromise of the indebtedness due from Beall & Fundaburk to plaintiffs for which defendant was guarantor, were not sufficient, and demurrers thereto were properly sustained. Under this particular guaranty, it was necessary for such pleas to allege that the defendant was thereby released; it was not sufficient to allege that the principal debtor was released, because the guaranty

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expressly authorized plaintiffs to compound with the debtors, without affecting the guaranty.

Construing the pleas most strongly against the pleader, defendant was not released by such general assignment by the debtor. We are of the opinion, however, that the court erred in giving the affirmative charge for the plaintiffs, under the evidence shown by this record, and upon the issues on which the trial was had.

The contract of guaranty upon which this suit was brought was, as before stated, a bilateral undertaking, signed by both the guaranteees and the guarantor. The undertaking on the part of the guaranteees was, that they would extend a line of credit to Beall & Fundaburk, to the amount of \$2,500, during the next year, in consideration that defendant would guarantee the payment of the amount of \$1,000. The amended complaint alleged that they did so credit Beall & Fundaburk, to that amount, during the year, and that was therefore made a material averment. It is true that the plaintiffs' evidence proved this averment without dispute; but the defendant's evidence, that of both Beall & Fundaburk, denied that credit was extended to the amount named in the contract and alleged in the complaint, and that they declined to furnish the full amount, and showed that it was extended to an amount less than that named. It was therefore for the jury to say whether, as to this averment, they believed the evidence of the plaintiffs or the evidence of the defendant. The effect of the charge was to take this question from the jury, which, of course, rendered the charge erroneous. We do not now decide that it was necessary for the complaint to allege that credit was extended to the amount of \$2,500; but the complaint was amended by changing the amount of the credit alleged to have been extended from \$2,450 to \$2,500, thus emphasizing the importance of the aver-

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ment. It was thus clearly made a material averment.

The defendant utterly failed to prove his special plea of non est factum. His own testimony, as well as the other evidence, showed that he did execute the contract sued upon. The letter written by him was properly admitted in evidence to disprove this plea. While it is a letter touching a settlement of the matter in dispute, and shows that it was written to avoid a suit, and was therefore not admissible to show liability under it, yet it was admissible to show that he did execute the contract.

As the case must be reversed, we will not pass upon those questions which may not arise on another trial; but we would suggest that the proof should be more certain that the copies of letters written by plaintiffs were true and correct transcripts of the originals, and that the originals were addressed and properly posted to the addressees, than it appears to have been upon this trial.

Reversed and remanded. All the Justices concur, save DOWDELL, C. J., not sitting.

Birmingham Trust & Savings Co. *v. Currey, et al.*

Assumpsit.

(Decided December 21, 1911. 57 South. 962.)

1. *Appeal and Error; Supersedeas; Curing Defects.*—On appeal, the defects in a supersedeas bond cannot be cured, but the defects therein should have been remedied in the trial court.

2. *Same; Presentation Below.*—Appellees cannot for the first time on appeal object to a supersedeas bond defective in such particulars, but not rendered wholly ineffectual thereby, and hence, such defects is not grounds for dismissal of the appeal, especially in view of the provisions of sections 2885-6, Code 1907.

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3. Same.—Only those grounds of objections to pleas which were taken by demurrer in the trial court and renewed in the appellate court will be considered on appeal.

4. Gaming; Action; Plea; Illegality.—Where the action was on a promissory note alleged to have been executed by the defendant to the assignor of plaintiff, a plea alleging that it was not intended or contemplated by either of the parties to the transaction that the actual cotton would be delivered, but that it was contemplated and intended by all such parties that at the time of delivery differences would be settled by paying or receiving the difference between the price when sold and the price at the time of delivery, and the note having been given for margins advanced and commissions for purchasing cotton on margins without actual delivery, was sufficient as alleging that the parties mutually intended that the transaction should be adjusted by the payment of the differences only, so as to render the contract unlawful, the word "contemplated" as used in the plea signifying purpose or intention.

5. Same; Validity; Purchasing on Margin.—An agreement by plaintiff's assignor with defendant to procure contracts for the purchase and sale of cotton on margins only, and without actual delivery, was void as between the parties, preventing recovery of commissions, or of margins advanced by the assignor in furtherance of the agreement, whether the contracts actually made with others by the assignor of plaintiff were for the actual purchase of cotton, or not, as that was a mere evidential fact, bearing on whether the contract between such assignor and such defendant, was a wagering contract.

6. Same; Evidence.—Where the action was on a promissory note alleged to have been executed by defendant to plaintiff's assignor for margins advanced and for commissions for purchasing cotton, it was competent, on the question of whether such purchases were intended as wagering contracts, to show that there had never been any actual delivery in other transactions between the parties involving the purchase of cotton for future delivery, although evidence as to gambling transactions between plaintiff's assignor and third persons were not admissible.

7. Statutes; Retro-active; Affecting Remedy.—Statutes which merely relate to the remedy, without affecting the right of action, are retro-active, and affect existing causes of action, as well as those subsequently accruing; hence, section 3351, Code 1907, (enacted in 1907) would apply in an action commenced in 1904, and tried in 1910.

8. Charge of Court; Purpose of Evidence.—Where evidence was admissible for a certain purpose only, a charge limiting it to that purpose should have been given on request.

APPEAL from Marshall Circuit Court.

Heard before Hon. W. W. HARALSON.

Action by the Birmingham Trust & Savings Company against W. W. Currey and others. From a judgment

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for defendants, plaintiff appeals. Reversed and remanded.

See, also, 160 Ala. 370, 49 South. 319, 135 Am. St. Rep. 102.

The action is in assumpsit on certain promissory notes executed by Currey, with the others names as sureties, to Hooper & Co., and by Hooper & Co. indorsed to the plaintiff. The pleas mentioned are as follows:

(10) "And for further plea on this behalf the defendants say that part of the consideration of the note sued on was and is a gambling consideration, which arose as follows: Defendant Currey contracted with A. B. Hooper that said A. B. Hooper should purchase for the use and benefit of defendant Currey from certain person or persons in the state of New York cotton for future deliveries by merely staking margins, it not being contemplated, either by said Hooper, or by said Currey, or by said person or persons in New York, that the actual cotton would be delivered, but that when the time for delivery arrived differences would be settled by paying or receiving the difference between price when sold and at the time stipulated for delivery, and that at the time of the making of said contract it was not intended, either by said Hooper or said Currey, or by said person or persons in New York, that the actual cotton would be delivered, but that the real intention of said Hooper and said Currey and said persons in New York was that the differences would be settled by paying or receiving the difference between price when sold and at the time stipulated for delivery. That said A. B. Hooper used the name of J. F. Hooper in making said transaction. That part of the consideration of the note sued on was and is commissions charged by the said A. B. Hooper for his services as a broker in negotiating and consummating said transaction. That the law in the

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state of New York was at the time of making said contract as follows, viz.: 'All wagers, bets or stakes made to depend upon any race, or upon any gaming by lot or chance, or upon any lot, chance, casualty, or unknown or contingent event whatever, shall be unlawful. All contracts for and on account of any money or property or thing in action so wagered, bet or staked shall be void. Any person who shall pay, deliver or deposit any money, property or thing in action upon the event of any wager or bet herein prohibited may sue for and recover the same of the winner or person to whom the same shall be paid or delivered, and of the stakeholder or other person in whose hands shall be deposited any such wager, bet or stake or any part thereof, whether the same shall have been paid over by such stakeholder, or not, and whether any such wager be lost or not.'"

(12) "That the consideration of the note sued on was and is a gambling consideration, which arose as follows: Defendant Currey contracted with J. F. Hooper that J. F. Hooper would purchase for the use and benefit of defendant Currey from person or persons in the state of New York cotton for future delivery by merely staking margins, it not being contemplated or intended by either of the parties, Hooper or Currey, or the person or persons in the state of New York, that the actual cotton would be delivered, but being contemplated and intended by all of said parties that when the time for delivery arrived differences would be settled by paying or receiving the difference between the price when sold and the price at the time of delivery. That cotton declined, and the note sued on was given for margins advanced or staked by Hooper for defendant Currey, at his request, in accordance with the said illegal contract above set out. That in said transaction Hooper acted as broker of defendant Currey, and received certain

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commissions as compensation for such services as broker, which are also a part of said note sued on. That the contract with said person or persons in the state of New York was made in the name J. F. Hooper, and the defendants aver that the laws of the state of New York provide as follows: 'All wagers, bets or stakes made to depend upon any race, or upon any gaming by lot or chance, or upon any lot, chance, casualty, or unknown or contingent event whatever, shall be unlawful. All contracts for and on account of any money or property or thing in action so wagered, bet or staked shall be void. Any person who shall pay, deliver or deposit any money or property or thing in action upon the event of any wager or bet herein prohibited may sue for and recover the same of the winner or person to whom the same shall be paid or delivered, and of the stakeholder or other person in whose hands shall be deposited any such wager, bet or stake or any part thereof, whether the same shall have been paid over by such stakeholder or not, and whether any such wager be lost or not.'

(13) "And for further plea on this behalf the defendants say that the consideration of the note sued on was and is a gambling consideration, which arose as follows: Defendant Currey contracted with J. F. Hooper, the payee of said note, that said Hooper should purchase for the use and benefit of defendant Currey, through A. Norden & Co., brokers, in the state of New York, cotton for future delivery, by merely staking margins with said A. Norden & Co., the margins to be advanced by Hooper as called for by said A. Norden & Co., it not being contemplated by either or by said Norden & Co., that the actual cotton would be delivered, but that the said contract of purchase should be settled by paying or receiving losses or winnings resulting from fluctuations in the market, and that at the time of the making

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of said contract it was not intended, either by said Hooper or Currey, or by Norden & Co., that the actual cotton would be delivered; but the real intention of said Hooper and Currey, and said Norden & Co., was that said contract of purchase should be settled by paying or receiving the losses or winnings resulting from fluctuations in the market. That said contract of purchase was to be made in, and in fact was governed by the laws of the state of New York. That at the time of making said contract of purchase the laws of the state of New York provided as follows: 'All wagers, bets or stakes made to depend upon any race, or any gambling by lot or chance, or upon any lot, chance, casualty or unknown contingent event whatever, shall be unlawful. All contracts for and on account of any money or property or thing in action so wagered, bet or staked shall be void. Any person who shall pay, deliver or deposit any money, property or thing in action upon the event of any wager or bet herein prohibited may sue for and recover the same of the winner or person to whom the same shall be paid or delivered, and of the stakeholder or other person in whose hands shall be deposited any such wager or bet or stake, or any part thereof, whether the same shall have been paid over by such stakeholder or not, and whether any such wager be lost or not.' And defendants aver that the note sued on was given for margins advanced or staked by said Hooper for defendant Currey, at his request, in accordance with said illegal contract, and also for commissions charged said Currey by said Hooper for services rendered in procuring said illegal contract."

The demurrsers assigned are: "(1) The facts relied on to show a gambling consideration are averred by way of recital. (2) The averment that the defendant bought cotton by simply staking the margins is indef-

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inite and uncertain. (3) It is not averred that it was mutually understood and agreed between the buyer and the seller that there was to be no delivery of the cotton contracted for. (4) The fact well pleaded does not show that the contract was a gambling one. (5) The averment that the margins were staked in accordance with the original illegal contract is the averment of a conclusion. (6) It is not averred that the person from whom Norden & Co. bought the cotton participated in the illegal intention not to deliver the cotton. (7) It is not averred that both buyer and seller agreed either expressly or impliedly that there should be no delivery of the cotton." These demurrers were filed to plea 13. The same demurrers were filed to plea 12, with these additional grounds: "It is not averred that it was understood or agreed by the seller of cotton, at the time the contract was made, that there should be no delivery of the cotton. The plea does not aver that both parties to the contract agreed that cotton should not be delivered. It is not shown how the said illegal contract entered into the note as a part of the consideration thereof." These same demurrers were interposed to plea 10.

STREET & ISBELL, and M. W. HOWARD, for appellant. The contracts were governed by the by-laws and rules of the New York Cotton Exchange, and therefore, by the laws of New York, and if valid, under laws of that state, and of the rules of the exchange, will be enforced here.—*Pete v. Hatcher*, 112 Ala. 514; *Guesnard v. R. R. Co.*, 76 Ala. 453; *Cauchorn v. Lusk*, 97 Ala. 674; *Bibb v. Allen*, 149 U. S. 489; *White v. Barbour*, 123 U. S. 243; 48 Am. St. Rep. 341; 29 A. & E. Enc. of Law 396. The by-laws and rules are legal and not opposed to any public policy.—*Springs v. James*, 121 N. Y. Supp. 1054; 61 C. C. A. 11; 198 U. S. 236; 182 U. S. 461. Delivery

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is intended and required thereby.—*White v. Barbour, supra*; *Walcott v. Health*, 78 Ill. 443; *Preston v. R. R. Co.*, 1 L. R. A., 140. The fact, if it be a fact, that gambling is done there affords no ground for inference against any particular contract made there.—*Roundtree v. Smith*, 108 U. S. 269; 198 U. S. 246; *Martin v. Smith*, 116 Ala. 639; *Odon v. Rippitoc*, 4 Ala. 68; *Smith v. Rogers*, 1 S. & P. 321. Actual delivery was contracted for in this case.—*Irwin v. Williar*, 110 U. S. 507; *Bibb v. Allen, supra*; *Hooper v. Nuckols*, 39 South. 711. Even Currey is not shown to have had an unlawful purpose. Hooper's knowledge or intention unimportant.—*Lee v. Boyd*, 86 Ala. 283; *Frenckel v. Hudson*, 82 Ala. 162; 1 A. & E. Enc. of Law, 1146; 1 Paige on Contr. 802. In the second place, any knowledge Hooper may have had was not acquired while in the discharge of his duties as cashier.—*Reid v. Bank*, 70 Ala. 211; *Goodbar v. Daniels*, 88 Ala. 590. Hooper's knowledge and intention not decisive.—*Hooper v. Nuckols, supra*; *Pearson v. Hooper*, 43 South. 576; *Bluthenthal v. McWhorter*, 131 Ala. 642; *Oxford Co. v. Quinchett*, 44 Ala. 487; *Hawley v. Bibb*, 69 Ala. 52. The anti-bucket shop act is not retroactive.—Inlett's Interpretation of Statutes, secs. 271, 282, 289, 290. In resisting the motion to dismiss the appeal for defects in the supersedeas bond, counsel filed good security for costs, and insist that if any defects exist in the supersedeas bond, they have been waived.—Secs. 3885-6, Code 1907; *Alexander v. Rea*, 50 Ala. 64; *Thornton v. Moore*, 61 Ala. 347; *Vaughan v. Higgins*, 68 Ala. 546; *Robinson v. Murphy*, 69 Ala. 543; *Coffee v. Norwood*, 81 Ala. 512.

GOODHUE, BRINDLEY & WHITE, for appellee. Counsel insist that an ineffectual attempt has been made to comply with section 2873, Code 1907, and that no se-

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curity is given for costs as contemplated by section 2872, and hence, the appeal should be dismissed. The contract was a gambling contract and it is sufficiently set up and shown to be such by plea 10.—*Bir. T. & S. Co. v. Currey*, 49 South. 319; 20 Cyc. 929; Id. 952; *Kennedy v. Stout*, 2 Ill. App. 133; *Embry v. Jemison*, 131 U. S. 336. It is competent to show in this connection other transactions in which purchases and sales were made without actual delivery.—14 A. & E. Enc. of Law. 620; 36 Cyc. 1217; 178 Mass. 591; *Woodvine v. Dean*, 194 Mass. 40; *Ingram v. Dooley*, Morr, 28. Section 3351, affects the remedy and not the right of action, and hence was applicable to this case since it was not tried until 1910.—Authorities next above.

SAYRE, J.—Appellant, having lost its case and suffered judgment for costs in the court below, undertook to execute a supersedeas as provided by section 2873 of the Code rather than security for costs only as provided by section 2872. This supersedeas is defective in two particulars: Thomas R. Roberts, who was one of the parties defendant to the judgment, is not named among the obligees. The sureties are not named in the body of the bond. No notice was taken of these defects at the time of the submission; but now appellees urge in their brief that the appeal ought to be dismissed by this court ex mero. Besides taking issue on the propriety of the proposition thus advanced, appellant has lodged with the clerk an affidavit showing that said Roberts was dead at the time the judgment was rendered, and offers to the court through the same agency a sufficient supersedeas bond in all respects regular as to form. These efforts to present a better record come too late, and, so far as the suggestion of the death of Roberts is concerned, that should have been made in the trial court.

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Appellees' suggestion, if meritorious at all, is likewise too late. The bond, though defective, is not ineffectual, and the objection to it should have been so timed as to afford appellant an opportunity of curing its defects.—Code, §§ 2885-2886, and cases cited in the annotations to section 2885.

This action was brought by appellant as indorsee of a promissory note executed by the defendants to J. F. Hooper, and by the latter negotiated to the plaintiff. The defense was rested upon the alleged illegality of the consideration, taking the form, to state it generally, that the obligation sued upon arose out of gambling transactions in cotton futures by the defendant Currey. The other defendants joined in the note as sureties. Pleas 10, 12, and 13, the issues made by which were submitted to the jury, and the sufficiency of which is questioned on this appeal, will be set out by the reporter in his statement of the case. However defective these pleas may be, we are to consider only that ground of objection to them taken in the court below and renewed here as a reason for reversal. Something is said in the brief to the effect that material facts are averred in the way of recital only, but we think the criticism may be said to be hypercritical at best, and we find nothing of it in the demurrer. The objection to be considered briefly is that defendants have failed to aver that it was mutually understood and agreed between the parties to the contracts for the sale of future delivery cotton that there was to be no delivery in fact. The language of plea 12, to deal with that as fairly illustrative of the rest, is that it was not "contemplated or intended by either of the parties * * * that the actual cotton would be delivered," but it was "contemplated and intended by all of said parties that, when the time for delivery arrived, differences would be settled by paying or receiving the

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difference between the price when sold and the price at the time of delivery." The argument seems to seize upon the word "contemplated" in the plea as if used to indicate that the parties had in view a discharge of the obligation of the contract between them by the payment of differences as a mere contingency, a method of settlement which the parties might in the then future lawfully agree upon if in the beginning they had a bona fide contract for actual delivery. That is a permissible use of the word, and it expresses the mind of the Supreme Judicial Court of Massachusetts when it said in *Barnes v. Smith*, 159 Mass. 344, 34 N. E. 403: "But a mere expectation on the part of plaintiff and of the defendant," who were parties in that court to an issue identical with that here in hand, "that the purchaser of shares would be willing to adjust the transactions on the basis of receiving or paying differences when there was no agreement or understanding to that effect, or to the effect that the plaintiff should protect the defendant from being called on to make or accept any actual deliveries of shares, would not be sufficient to render the contract illegal." So, also, in respect to *Chicago Board of Trade v. Christie*, 198 U. S. 236, 25 Sup. Ct. 637, 49 L. Ed. 1031, where this language was used: "The fact that contracts are satisfied in this way by set-off and the payment of differences detracts in no degree from the good faith of the parties, and, if the parties know when they make such contracts that they are likely to have a chance to satisfy them in that way and intend to make use of it, that fact is perfectly consistent with a serious business purpose and an intent that the contract shall mean what is says." The court added: "There is no doubt, from the rules of the Board of Trade or the evidence, that the contracts made between the members are intended and supposed to be binding in

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manner and form as they are made." But "contemplation" also signifies "purpose" or "intention more definitely, and the purport of these pleas, in which contemplation and intention are conjoined, is that the parties mutually contemplated and intended in the beginning that their transactions should be adjusted by the payment of differences only. That intention rendered the contracts unlawful alike in New York and Alabama. —*Hawley v. Bibb*, 69 Ala. 52; *Perryman v. Wolffe*, 93 Ala. 290, 9 South. 148; *Allen v. Caldwell*, 149 Ala. 293; 42 South. 855; *Story v. Solomon*, 71 N. Y. 420; *Embrey v. Jemison*, 131 U. S. 336, 9 Sup. Ct. 776, 33 L. Td. 172. Demurrers to these pleas were properly overruled.

I'lea 13 alleges that defendant Currey contracted with J. F. Hooper to purchase cotton for future delivery through Norden & Co., brokers in New York, there being no intention on the part of defendant, Hooper, or Norden & Co., that the cotton should be delivered. The replication avers that Norden & Co. purchased from Weld & Co. and others, and that the sellers "did not know of and participate in the alleged unlawful purpose of Currey." The theory of the replication is that the contracts of sale were between the New York sellers and the defendant Currey, and that the concurring unlawful purpose or intention of both parties is necessary to render these contracts unlawful. The proposition of law involved in this contention is not denied in its proper application. But the pith of the plea is that defendant employed Hooper to procure for him contracts with others which were to be settled by the payment of differences only; Hooper advancing money or credit for that purpose. If Hooper, under this employment, procured contracts which could be settled only by the actual delivery of cotton on the demand of either party, Hooper, or those through whom he acted, if they

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contracted, in their own names, assumed the burden of such contracts. He could not work a change in the nature of Currey's obligation without his assent. The contracts which, according to the plea, Hooper agreed to procure for Currey, being denounced by statute alike in New York and Alabama, the contracts between Hooper and Currey to the end of their procurement was unlawful also, and the former cannot recover commissions or money advanced for their furtherance. What may have been the nature of the contracts with these parties into which Hooper entered for the purpose of executing his agreement with Currey as matter of substantive law is immaterial to the parties to the present litigation. At best, it is a mere evidential circumstance corroborative of plaintiff's version of the facts.—*Irwin v. Williar*, 110 U. S., 499, 4 Sup. Ct. 160, 28 L. Ed. 225; *Embrey v. Jemison*, *supra*; *Harvey v. Merrill*, 150 Mass. 1, 22 N. E. 49, 5 L. R. R. 200, 15 Am. St. Rep. 159; *Fareira v. Gabell*, 89 Pa. 91; *Rogers v. Marriott*, 59 Neb. 759, 82 N. W. 21; *Kennedy v. Stout*, 26 Ill. App. 133; *Jamieson v. Wallace*, 167 Ill. 388, 47 N. E. 762, 59 Am. St. Rep. 302. We find nothing to the contrary in *White v. Barber*, 123 U. S. 392, 8 Sup. Ct. 221, 31 L. Ed. 243, cited by appellant. In that case it was determined in the trial court, and on appeal it was assumed as a fact, that the contracts involved were not intended to be wagering speculations. Nor do we see that the cases of *Bluthenthal v. McWhorter*, 131 Ala. 642, 31 South. 559, and *Oxford Co. v. Quinchett*, 44 Ala. 487, or the authorities cited in connection with them, stand in the way of our conclusion. Conceding that, to disable himself to recover money lent, the lender must do something more than simply advance the money with a knowledge of the unlawful purpose for which it is wanted, that to have that effect he must promote the

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enterprise more directly, the averment here, we note, is in effect that plaintiff's assignor, if he kept within the limits of his authority, if he procured such contracts as he was expected to procure, as we must assume he did, actually staked the money on the result of unlawful contracts.

In plea 10 plaintiff's assignor is not shown to have been a party to the transactions out of which arose the liability sought to be enforced. The averment is that A. B. Hooper used the name of plaintiff's assignor, and that "part of the consideration of the note sued on was and is commissions charged by the said A. B. Hooper for his services as a broker in negotiating and consummating said transaction," all the parties to which, to state the further effect of the plea, intended it for a gambling transaction. The demurrer to the replication, which averred that the note was executed by the defendant to plaintiff's assignor to reimburse him for money of his used in the transaction, was no doubt sustained on the idea that whether plaintiff's assignor did or did not know the illegal nature of the transaction, and though, if ignorant, he was entitled to have his money, yet, when he accepted and sued on a note securing unlawful commissions along with the rest, he adopted the transaction as a whole. The note was tainted with illegality. It was impossible to say which part of the consideration induced the promise; and defendant's demurrer to the replication was properly sustained.—*Folmar v. Siler*, 132 Ala. 297, 31 South. 719; *Pettit v. Pettit*, 32 Ala. 288.

It appeared without conflict that A. B. Hooper, son of plaintiff's assignor, J. F. Hooper, assisted his father in carrying on the latter's business, which in general was banking, and the transactions in controversy were negotiated by him in his father's name. There was no

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question about A. B. Hooper's agency to procure for customers contracts for the purchase or sale of cotton for future delivery, nor was anything said of commissions in pleas 12 and 13, so that, under these pleas and the undisputed facts, the only questions at issue were whether A. B. Hooper and Currey mutually intended that the contracts to be negotiated in New York should be wagers, and, if so, whether plaintiff's assignor had knowledge of that fact. As tending to establish defendant's contention in respect to these issues, he was permitted to show that in other transactions involving the purchase for future delivery of cotton and ribs, some of them between Hooper and Currey, others between Hooper and other parties, there had never been any actual deliveries, and that settlements had been made in those instances by the payment of differences only. To these rulings exceptions were duly reserved, and they are assigned for error. When this case was here on a former appeal (160 Ala. 370, 49 South. 319, 135 Am. St. Rep. 102), it was ruled that in determining J. F. Hooper's knowledge of the nature of the transactions it was competent to show similar transactions with others had with his knowledge and consent. Unquestionably the validity of every separate transaction is to be determined upon its own facts. But it does not follow that the admissibility of every evidential circumstance must be tested by its own intrinsic probative force without regard to its relation with other evidence in the case. "It is the bearing, not the independent force of the particular fact or circumstance, upon which its relevancy depends."—*Nelms v. Steiner*, 113 Ala. 562, 22 South. 435. It is to be observed, also, that the former pronouncement in this case had nothing to do with the manner of proving the intrinsic illegality of contracts for future delivery, but touched only upon the method

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of fastening upon the principal notice of the illegality of contracts negotiated by his agent; such illegality being assumed in the statement. It related to the relevancy of a course of dealing between principal and agent as going to show the agent's general authority, and the principal's knowledge of what his agent had done in a particular case. The questions now presented, both by objections to evidence and by charges seeking to limit the field in which such evidence should operate, are different. The authorities are in conflict as to whether other and distant transactions between the same parties are admissible upon the question of the legality of such contracts as are involved in this suit. We think the correct rule is to be found stated in *Crandall v. White*, 164 Mass. 54, 41 N. E. 204, a case of the same general character as this, as follows: "It is a general rule that separate and distinct acts unconnected with those in suit are not admissible for the purpose of raising an inference that a party did the particular things which he is charged with doing. But we think in this case that the transactions objected to were of such a nature and were so connected with those in suit, and so near to them in time, that they might fairly be regarded as having some tendency to show that the defendant White had reasonable cause to believe that no intention existed actually to perform the contracts which form the basis of the present suit." But it is held, and properly we think, that the fact that a party has engaged in gambling transactions with strangers is wholly irrelevant.—*Potts v. Dunlap*, 110 Pa. 177, 20 Atl. 413. Such evidence, in general, "it would be manifestly unjust to admit, since the conduct of one man under certain circumstances or towards certain individuals, varying as it will necessarily do according to the motives which influence him, the qualities he possesses and his

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knowledge of the character of those with whom he is dealing, can never afford a safe criterion by which to judge of the behavior of another man similarly situated, or of the same man toward other persons."—1 Tayl. Ev. (10th Ed.) § 317, quoted in Jones, Ev. § 140. All the considerations which make against admissibility of res inter alios actæ obtain here. However, this testimony being relevant to one aspect of the case, or rather to one issue involved in the case, as was held on the former appeal, it was properly admitted. But in charges 15 and 16, refused by the court, appellant sought to limit the operation and effect of this evidence in accordance with the views we have expressed in regard to its relevancy. That was the approved method of reaching the end desired, and in refusing these charges the court committed error.

It has long been a part of the statute law of this state that "all contracts, founded in whole or in part, on a gambling consideration, are void."—Code, § 3338. The act of March 7, 1907 (Acts, p. 448 et seq.; Code, §§ 3349-3352, 6473-6478), enumerates and declares void certain "future contracts," including contracts for the sale of cotton, provides criminal punishment for all persons who become parties to such contracts, and establishes a rule of evidence for controversies arising out of such contracts. In so far as the act of 1907 enumerates those contracts which shall be held void, its probable effect, if not its purpose, was to withhold the law's denunciation from contracts in commodities not numerated. In so far as it declares void the enumerated contracts, it re-enacts section 3338, and declares again the law as it had been declared by this court on several occasions. It does not purport to effect, nor could it effect, any change in the substantive rights of the parties to the transactions at issue which were had

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before the statute of 1907. It was in terms limited to take effect from the beginning of the year 1908. This suit was commenced in 1904 and tried in 1910. The substantive rights of the parties were to be decided according to the law as it existed when the action was begun; but the general principle is that statutory alterations in the rules and methods of procedure, including rules of evidence, are always retrospective unless there be some good reason against it.—Endlich, *Interp. Stat.* §§ 282-286. “Statutes which relate alone to the remedy, without creating, enlarging, or destroying the right, operate generally on existing causes of action, as well as those which afterwards accrue.”—*Coosa River Co. v. Barclay*, 30 Ala. 120; *Tutwiler v. Tuscaloosa Co.*, 89 Ala. 391, 7 South. 398. There is no vested right in the rules of evidence. It is clear that there was no actual delivery of cotton at any time, and that “margins” were deposited or secured. The rule of evidence enacted in section 3351 of the Code was therefore operative in the case. And on this rule, in connection with all the circumstances in evidence, it was for the jury to say whether A. B. Hooper and Currey had a common purpose that there should be no deliveries of cotton, and, if so, whether plaintiff’s assignor had knowledge of that fact. We have considered the questions raised. For the error pointed out the judgment is reversed; the cause is remanded.

Reversed and remanded. All the Justices concur, except DOWDELL, C. J., not sitting.

[Montgomery County v. Pruett.]

Montgomery County *v.* Pruett.

Assumpsit.

(Decided November 21, 1911. Rehearing denied February 15, 1912.
57 South. 823.)

1. *Counties; Implied Contracts.*—If the contract is within the range of a county's contractual powers, general assumpsit on an implied contract will lie against it.

2. *Work and Labor; General Issue; Plea.*—Where the common count for work and labor done is brought, a plea setting up a breach of a provision of the contract was no answer thereto, and was subject to demurrer, as under such count, and the general issue plaintiff is required to prove either an express contract which he has fully performed or the furnishing of labor and material which were of benefit to the defendant and were voluntarily accepted.

3. *Appeal and Error; Harmless Error; Pleading.*—Where the plea could not have been amended without introducing matter wholly foreign to it as framed, so as to meet the counts to which it was filed, any error in sustaining a demurrer which did not specify the inaptness of the plea as an answer to the complaint was harmless.

4. *Same.*—A plea setting up non-performance as an answer to counts to which the general denial was also filed, was unnecessary as the general denial placed on the plaintiff the burden of proving performance of all obligation resting on him under the agreement and also permitted defendant to show non-performance, and hence, it was not error to sustain demurrer to such plea.

5. *Same.*—Where a defendant appeals and assigns as error, the sustaining of a demurrer to a special plea, the burden is on him to show that he was denied the benefit of the matters set up in such plea in order to work a reversal, and hence the record need not affirmatively show that defendant actually received the benefit under the general denial of the matters specially pleaded.

APPEAL from Montgomery City Court.

Heard before Hon. WILLIAM H. THOMAS.

Action by O. J. Pruett against the County of Montgomery. Judgment for plaintiff and defendant appeals. Affirmed.

E. S. WATTS, and J. M. CHILTON, for appellant. The demurrer was general, and hence, was improperly sustained.—*Cowan v. Motley*, 125 Ala. 371; *Sledge v.*

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Swift, 53 Ala. 110. The plea was good and the demur-
rer improperly sustained.—*K. C. M. & B. v. Burton*, 37
South. 240; *Snell v. Derricot*, 49 South. 895; *Milligan
v. Pollard*, 112 Ala. 465; *Prior v. Beck*, 21 Ala. 393.
The agreement to furnish evidence that there was noth-
ing owing to materialmen, contractors or other em-
ployees was a condition precedent to recovery.—9 Pet.
319; 25 L. Ed. 255; 27 Id.; 1053; 24 Ib. 1106; 34 Id.
917; *Pappott v. Barbour*, 51 South. 725. Counties are
civil or political subdivisions created to aid in the ad-
ministration of government, and are included in the
term "State" which is a concrete whole.—124 Ala. 491;
80 Ala. 287; 79 Ala. 419; 54 Ala. 639. Therefore, it
cannot be sued upon the common counts.—*Montgomery
County v. Naftel*, 127 Ala. 563; 118 S. W. 309.

HILL, HILL & WHITING, for appellee. The sustaining
of the demurrers to the pleas was harmless as the de-
fendant had the benefit of the matters therein
sought to be set up under its general denial.
The plaintiff had the burden of showing com-
plete compliance and the general denial authorized the
defendant to show non-performance. Hence, if the de-
murrers were general there was no harm in sustaining
them.—*Ryal v. Allen*, 143 Ala. 227; *Barker v. Allen*,
161 Ala. 288; *DeLeon v. Walters*, 163 Ala. 502. In any
event the pleas were bad.—119 Ala. 588; 164 Ala. 508;
154 Ala. 301, and cases there cited. The matter was
in the contractual power of the county and plaintiff
was entitled to recover on showing full compliance
with the terms of the contract.—*Martin v. Masscy*, 127
Ala. 508.

SOMERVILLE, J.—O. J. Pruett sued the county of
Montgomery in the city court; the original complaint

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containing seven counts. Count 1 is on account stated; counts 2 and 6 for work and labor done, and materials furnished; counts 3 and 5 and 7 on accounts due December 1, 1908; and count 4 claims damages for breach of a contract by which plaintiff was to do certain work and furnish certain materials in the construction of three public county roads. It sets forth the specifications, avers full performance by plaintiff, and alleges defendant's failure to pay plaintiff therefor.

To the entire complaint defendant filed three special pleas. Plea 1 sets up an alleged provision in the contract upon which plaintiff's claims are founded, to the effect that the contractor was specifically bound to furnish the engineer with satisfactory evidence that all persons who did work or furnished material for said road construction, or who sustained damage or injury therein, or from, had been duly paid or secured, and that within 10 days after completion of the work, and before a final estimate was made, notice should be given the engineer that any balance due for said causes had been paid or released, and avers that said provisions are conditions precedent to the defendant's liability, and plaintiff has failed to comply therewith.

Pleas 2 and 3 are in set-off.

Plea 4, filed to count 4 only, denies that defendant ever entered into any such contract as set out therein; but avers that there was a separate and independent contract for each of the three roads specified.

Plea 5 is the general issue to the entire complaint.

Plaintiff demurred on variously assigned grounds to pleas 1, 2, 3, and 4. The demurrer to plea 1 was sustained, and the demurrs to pleas 2, 3, and 4 were overruled.

Plaintiff then amended his complaint by adding counts 8, 9, and 10, which do not differ from count 4,

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except that each count is confined to a single one of the three roads set out inclusively in count 4.

The defendant then refiled its pleas 1, 2, 3, 4, and 5 to the complaint as amended; and plaintiff refiled his demurrers to pleas 1, 2, 3, and 4. The court sustained the demurrers to pleas 1 and 4; and overruled the demurrers to pleas 2 and 3. Thus to the 10 counts of the complaint there remained the two pleas of set-off and the general issue, and upon these there was trial and verdict for the plaintiff.

Plea 4 was clearly but an amplified form of the general issue; or, if its special averments are considered, as an attempted answer to counts 8, 9, and 10, it may well be denominated frivolous, as charged in the demurrer. And, as the general issue was otherwise pleaded, the elimination of this plea could not in any case have prejudiced the defendant, although erroneously effected by general demurrer.

With respect to plea 1 and the defense it presents it is insisted for the appellee that even if the demurrer was erroneously sustained, there was no injury to appellant, because the facts pleaded therein were just as available and would have been equally advantageous, under the plea of the general issue.

It is a mistake to suppose, as argued for the appellant, that a county may not be liable on an implied contract, although it is true that no contract can be implied against a county unless it is one which the county is by law empowered to make. And so, ratification of an unauthorized—if legally permissible—contract may be implied.—11 Cyc. 478, D. There are no decisions in this state holding a contrary view. *Nafiel v. County of Montgomery*, 127 Ala. 563, 567, 29 South. 29, simply declares that a county is only liable for a debt which it has actually contracted, but not necessarily by ex-

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press contract. On the other hand, *Scarborough v. Watson*, 140 Ala. 351, 37 South. 281, by implication concedes the propriety of the common counts in an action against a county. And it is well settled that general assumpsit lies against municipal corporations.—*Allen v. Lafayette*, 89 Ala. 649, 8 South. 30, 9 L. R. A. 497; *B. E. L. & P. Co. v. Montgomery*, 114 Ala. 445, 21 South. 960.

We conclude, therefore, that general assumpsit lies against a county within the range of its contractual powers, just as it does against an individual.

Under the common counts (1, 2, 3, 5, 6, and 7), the plaintiff was required by the plea of the general issue either to prove an express contract with all the terms of which he had fully complied (*Stafford v. Sibley*, 106 Ala. 189, 17 South. 324; *Abercrombie v. Vandiver*, 126 Ala. 513, 532, 28 South. 491); or else that he had furnished labor or materials which were of benefit to the defendant, and which were voluntarily accepted by it (*Davis v. Badders*, 95 Ala. 348, 10 South. 422; *Flor- ence Co. v. Hanby*, 101 Ala. 15, 13 South. 343; *Bell v. Teague*, 85 Ala. 211, 3 South. 861; *Andrews v. Tucker*, 127 Ala. 602, 29 South. 34; *Martin v. Massie*, 127 Ala. 504, 29 South. 31; *Aarnes v. Windham*, 137 Ala. 513, 34 South. 816; *Henderson-Boyd Lumber Co. v. Cook*, 149 Ala. 227, 42 South. 836; 6 Cyc. 111). In either case, defendant's special plea 1, if true, would be wholly irrelevant and inappropriate as an answer to these counts; and hence the rule that a plea setting up plaintiff's breach of a special provision of a contract is not a sufficient answer to the common counts, though it may be to a count on the contract.—*Everrood v. Schwartzkopf*, 123 Ind. 35, 23 N. E. 969. Nor could the plea have been amended so as to make it pertinent to these counts

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without introducing matter wholly foreign to the plea as framed.

Hence, so far as these common counts are concerned, although the demurrer did not specify the inaptness of the plea as an answer to them, the sustaining of the demurrer was error without injury, and cannot be complained of by appellant.—*Ryall v. Allen*, 143 Ala. 222, 227, 38 South. 851; *DeLeon v. Walters*, 163 Ala. 502; 50 South. 934; 19 Ann. Cas. 914; *S. L. & S. F. R. R. Co. v. Phillips*, 165 Ala. 504, 51 South. 638; *Schuler v. Fisher*, 67 Ala. 184, 52 South. 390; *McGehee v. W. U. T. Co.*, 169 Ala. 109, 53 South. 211.

If, however, the elimination of the plea be considered with respect to counts 4, 8, 9, and 10, which declare specially on the contract, and it be conceded that the plea was not subject to any ground of demurrer specified, we must still conclude that the error in sustaining the demurrer was not injurious to appellant.

Each one of these counts contains the averment that plaintiff had complied with all the provisions of the contract sued on. Defendant's plea 5 denied "each and every averment thereof." Under the issue thus framed, the plaintiff was bound to prove his performance of every obligation devolved on him by the terms of the contract, especially one which was a condition precedent to his right to demand payment for work and materials furnished, and equally it was open to the defendant to show plaintiff's non-performance of any condition or stipulation essential to his right of action therefor.—*Abercrombie v. Vandiver*, 126 Ala. 513, 531, 28 South. 491; *Aarnes v. Windham*, 137 Ala. 513, 518, 34 South. 816. Such being the scope of the issue actually submitted to the jury, the erroneous elimination of the special plea 1 cannot, under the decisions of this court, be regarded as prejudicial.—*I. & N. R. R. Co. v.*

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Hall, 131 Ala. 161, 32 South. 603; *N. C. & St. L. Ry. v. Bates*, 133 Ala. 447, 32 South. 589; *U. S. F. & G. Co. v. Damskib, Habil*, 138 Ala. 348, 35 South. 344; *Western Ry. v. Russell*, 144 Ala. 142, 39 South. 311, 113 Am. St. Rep. 24; *Metcalf v. St. L., etc., R. R. Co.*, 156 Ala. 240, 47 South. 158. These cases, whether wisely or not, have changed the rule announced in some of the older cases (e. g., *Rice v. Drennen*, 75 Ala. 335; *Graham v. Woodall*, 86 Ala. 313, 5 South. 687) that the record must affirmatively show that the defendant actually received the benefit under the general issue of the matter specially pleaded. As the rule now stands, he must show that such benefit was denied him.

We are not unmindful of the rule of pleading in actions on special contracts which was announced in *American Oak Extract Co. v. Ryan*, 112 Ala. 337, 20 South. 644, to the effect that, in an action for breach of contract, the defendant cannot, under the general issue, defeat the plaintiff's cause of action by proving other stipulations relied on to excuse performance, which were not set out in the complaint. In that case, however, there was no allusion in the complaint to any other stipulations, and no averment that plaintiff had complied with all the provisions of the contract; and hence his non-compliance was not within the issue made by the pleadings. Perhaps, also, *American O. E. Co. v. Ryan* should be distinguished from *Abercrombie v. Vandiver*, 126 Ala. 513, 531, 28 South. 491, where, under the general issue to counts in special and general assumpsit, proof of non-compliance with a condition precedent was held to defeat plaintiff's recovery for certain extra work.

This view of the case renders it unnecessary to consider whether the plea was obnoxious to any of the spe-

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cial grounds of demurrer assigned thereto. Let the judgment be affirmed.

Affirmed. All the Justices concur. ANDERSON, J., without dissenting from the opinion, prefers to place his concurrence on the ground that the demurrs to defendant's pleas were properly sustained.

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Assumpsit.

(Decided February 8, 1912. 57 South. 814.)

1. *Bills and Notes; Bona Fide Purchaser.*—A purchaser of negotiable paper, in due course, before maturity, without notice of defects, for value, is a bona fide holder, and takes such paper free from defenses available between the original parties.

2. *Same; Illegal Notes.*—A note which is expressly made illegal and void by statute is void in the hands of even otherwise bona fide holders without notice of illegality; but if the statute merely, expressly or impliedly makes the consideration illegal, the note will be valid in the hands of a bona fide purchaser without notice, though the burden is upon the purchaser to show that he is a bona fide holder.

3. *Same.*—Where a corporation purchased from a firm composed of persons who afterwards became stockholders and officers of the corporation, a negotiable note executed by a municipality for liquors purchased for a dispensary, which note was illegal in the hands of the firm because executed in violation of the dispensary law, the corporation is not a bona fide holder without notice, knowledge of the partners being imputed to the corporation.

4. *Pleading; Demurrers; Admission.*—A demurrer to a rejoinder admits the facts therein alleged.

APPEAL from Houston Circuit Court.

Heard before Hon. H. A. PEARCE.

Action by Bluthenthal & Bickart against the city of Columbia upon certain promissory notes. Judgment for defendant and plaintiff appeals. Affirmed.

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ESPY & FARMER, for appellant. The note was a commercial paper.—Acts 1909, p. 154. Cities have power to borrow money and make notes.—Sec. 1409. Power to borrow carries with it the power to issue the usual evidence of indebtedness.—*Lytle v. Bank*, 121 Ala. 215; 138 U. S. 1609. A town is equally bound by its contract as an individual.—*State ex rel. v. Cobb*, 64 Ala. 127; 98 Am. Dec. 646; 64 Am. Dec. 423. The city is answerable to an innocent holder for value without notice of its commercial paper.—31 Am. Dec. 699; 86 U. S. 171. The fact that Bluthenthal & Bickart as individuals knew of the infirmities in the notes, was not notice to the corporation.—10 Cyc. 1063; 1 Morse on Banks, 109; 122 Mo. 332; *Aycock v. First Nat. Bank*, 45 South. 501.

W. L. LEE, for appellee. The note was given for a sale on credit and was void.—*Bluthenthal & Bickart v. Headland*, 132 Ala. 252; *Allen v. LaFayette*, 89 Ala. 641; *Austin v. Town of Cottonwood* in MSS. The corporation was without express authority to execute the note and has not an incidental or implied power.—*Blackburn v. Lehman*, 63 Ala. 541; *R. R. Co. v. Dunn*, 51 Ala. 128. The note was void ab initio, and hence, was void in the hands of an otherwise bona fide holder.—*Brown v. Bank*, 103 Ala. 123; Daniel Negotiable Instruments, secs. 1, 769a. The corporation was chargeable with notice.—*Goodbar v. Daniels*, 88 Ala. 590; *Hall, et al. v. Haley Company*, 56 South. 726.

MAYFIELD, J.—Appellants, a private corporation, sued appellee, a municipal corporation, on a bond or note executed by the municipality to the appellants, on July 29, 1907, due one year thereafter. To the complaint the defendant filed a plea alleging that at the

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time the note sued on was executed, appellant corporation was a partnership composed of Aaron Bluthenthal and Monroe Bickart; that defendant was a municipal corporation, carrying on a dispensary under a general law known as the Moody dispensary law; that the appellants as such partnership attempted to sell to the defendant a lot of spirituous, vinous, and malt liquors, on credit, in express violation of the dispensary law; that the consideration of the note sued upon was the liquor thus sold to the municipal corporation in violation of the statute; that, the consideration of said note being illegal, the note itself was void; and that the plaintiff was not entitled to recover thereon in this action. To this plea the plaintiff corporation filed a replication, alleging that the note sued on was negotiable, and that the partnership sold and assigned it to the plaintiff corporation before maturity and for value. To this replication the defendant filed a rejoinder to the effect that said Bluthenthal and Bickart, who composed the partnership which sold and assigned the note to the corporation, were both stockholders, officers, and managers of the corporation to which the note was so sold and assigned, and that they, as partners and as officers and managers of the plaintiff corporation to which the note was sold and assigned, had full knowledge of all the facts set forth in the plea showing the note to be illegal and void, at the time it was so transferred and assigned to the plaintiff corporation. To this rejoinder the plaintiff demurred, and, its demurrer being overruled, it declined to plead further, and suffered judgment, from which judgment this appeal is prosecuted.

A contract very similar to the one forming the original consideration for this note was considered by this court in the case of *Bluthenthal & Bickart v. Headland*,

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132 Ala. 252, 31 South. 87, 90 Am. St. Rep. 904. In that case it was ruled that the sale of liquors, upon credit instead of for cash, to a dispensary, for the town of Headland, was in violation of the statute providing for the establishment and maintenance of dispensaries, and such sale was therefore illegal and void, and that no cause of action could arise from such contract, nor would assumpsit lie upon an implied contract, though the city received and enjoyed the benefit of the goods sold. The correctness of that decision is not assailed on this appeal, but the case is attempted to be distinguished upon the theory that this is an action upon a negotiable note by a bona fide purchaser for value, without notice of the illegal consideration upon which it was founded. The rejoinder, however, alleged that the plaintiff corporation, through its officers and managers, had notice of the illegal consideration before, and at the time, it became the purchaser and transferee of said note, and that it was therefore chargeable with notice, and liable to all defenses available against the note in the hands of the original payee.

We are of the opinion that the rulings of the trial court in this case must be sustained, for several reasons, some of which we will now proceed to state.

It is true, as contended by appellant, that a purchaser of a negotiable paper in due course of business, before maturity and without notice of defenses that existed between the original parties, or that had subsequently arisen, is a bona fide holder for value, and as such takes the instrument free from defenses which were available between such original parties.—*Brown v. Bank*, 103 Ala. 123, 126, 15 South. 435. In the hands of such a holder such an instrument is discharged of all legal and equitable defenses to which it may have been subjected before it came into such bona fide hands. This

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has been repeatedly held by this court to be true, even when the note was put into circulation by fraud, or was based upon an illegal consideration.

Mr. Randolph, in his work on Commercial Paper, and Mr. Daniel, in his work on Negotiable Instruments, both say that such a paper is in some respects like the currency of the country, a circulating credit, and that before maturity the genuineness of the obligation and the solvency of the parties are the sole matters to be considered in determining its value, and that such a paper has been aptly called a courier without luggage, which carries on its face its own history, and that the policy of the law requires that it shall tell its own history, and have effect in the hands of innocent holders for value according to what appears on its face.—Daniel, Neg. Instr. § 1, 169a; Randolph, Com. Pap. § 14; *Brown v. Bank*, 103 Ala. 123-127, 15 South. 435.

There are, however, a few exceptions to this rule, one of which is where a statute creates the prohibition which makes the note illegal, and thus makes it absolutely void in the hands of every holder, whether he has had such notice or not. Among such statutes, says Story, seem to be those against gaming and usury in England and in some of the American states.—Story, Prom. Notes, § 192, p. 151. Mr. Daniel (Neg. Instr. § 197) asserts the same doctrine; and in substance says (section 198) that if a statute merely declares, expressly or by implication, that the consideration shall be deemed illegal, the bill or note founded upon such consideration will be valid in the hands of a bona fide holder without notice, but that the burden of proof will be upon such party to show that he is a bona fide holder without notice. He further says (section 199) that where a statute declares that all payments made for spirituous liquors sold contrary to law "should be held and con-

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sidered to have been received in violation of law, without consideration, and against law, equity, and good conscience," it was held that a bill given for liquors so sold was valid in the hands of a bona fide holder without notice. As stated by these authorities, and as often repeated by this court, courts will not lend their aid to carry into effect contracts entered into by parties with a view of accomplishing anything which is prohibited by law; but it is equally well settled that if the consideration of a negotiable paper is against law, yet it cannot be avoided on that account in the hands of a bona fide holder who is not a party nor privy to the illegality of the consideration, subject, however, to the exceptions before noted.

The law upon this subject has been well stated by Chief Justice Shaw, in the case of *Cazet v. Field*, 9 Gray (ass.) 330, where he decided that as a rule a party cannot recover who is in the wrong himself, nor give a better title than he himself holds. But the law goes further in favor of commerce, and gives a high degree of character and honor to bills of exchange and negotiable promissory notes in the hands of indorsees without actual or constructive notice of anything affecting their validity or credit. If indorsees take such paper when overdue, this should put them on inquiry as to why it had not been paid at maturity; and such papers must always be taken in the ordinary course of business, and not in unusual circumstances. He further says, in the same case, that the general rule with regard to commercial paper founded on illegal consideration must be taken with some exceptions, and affirms what Daniel and Story said with regard to the provisions of some statutes against usury and gaming made notes, given in violation of the statute. In those cases the statute usually declares that notes will be abso-

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lutely null and void to all intents and purposes, or, as it is sometimes said, it is applied to the contract, and not to the party.

It is unnecessary to decide whether or not the municipal corporation in this cause could issue a negotiable paper, under the view we take of the whole case. Counsel for appellant insists that the Municipal Code authorized the municipality to issue negotiable paper. This, we do not decide, for two reasons: (1) Because it is not necessary to a decision of this case; and (2) because the Municipal Code had not been adopted, nor the statute passed upon which its codification was based, when the action in question was instituted.

Moreover, if the facts alleged in the rejoinder be true—and on demurrer they must be so considered—the plaintiff corporation had notice of the illegality of the contract and consideration upon which the note in question was founded; and it was therefore not a bona fide purchaser for value without notice.

It is insisted by the appellant, however, that knowledge of the defense to the note which was acquired by Bluthenthal & Bickart before they became stockholders or officers and managers of the plaintiff corporation was not knowledge or notice to the corporation of such defense. This question was fully considered and discussed in a recent opinion in the case of *Hall & Brown Co. v. Haley Co.*, 174 Ala. 199; 56 South. 726, in which the authorities are fully reviewed.

The rejoinder in the case brings the plaintiff corporation fully within the rule declared by this court in *Lea v. Mercantile Co.*, 147 Ala. 421, 42 South. 415, 8 L. R. A. (N. S.) 279, 119 Am. St. Rep. 93, and within the rule declared in *Goodbar, White & Co. v. Daniel*, 88 Ala. 590, 7 South. 254, 16 Am. St. Rep. 76, which is

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clearly pointed out in the opinion by SOMERVILLE, J., in the *Hall-Brown-Haley Case, supra*.

If the facts set up in the rejoinder be true, notice to the plaintiff corporation of this defense would have had to be communicated to it through Bluthenthal & Bickart; and certainly no rule of law would require a person to be notified of that of which he already has notice, and which would impart to him no information.

We, therefore, conclude that the trial court properly overruled the demurrer to the rejoinder, and the judgment appealed from must be affirmed.

Affirmed. All the Justices concur:

Pendrey *v.* Godwin, *et al.*

Ejectment.

(Decided February 8, 1912. 57 South. 724.)

1. *Deeds; Property Conveyed.*—Where the deed relied on by plaintiff conveyed to him property described by government subdivision and known as the J. M. place, and recited that it was the grantor's purpose to convey the J. M. place, whether the description by metes and bounds was correct or not, and authorized grantor's executor to ascertain the proper subdivision, should the description be incorrect, the deed was admissible in connection with evidence identifying the lands sued for as being a part of the J. M. place, notwithstanding the incorrectness of the government subdivision.

2. *Ejectment; Evidence; Identification.*—In an action of ejectment it is competent to introduce parol evidence of the identity of land as being part of a place described in a deed, as the place known as the J. M. place.

APPEAL from Crenshaw Circuit Court.

Heard before Hon. J. C. RICHARDSON.

Ejectment by S. J. Pendrey against Daniel Godwin and another. From a judgment of nonsuit, plaintiff appeals. Reversed and remanded.

[Pendrey v. Godwin, et al.]

Plaintiff offered to introduce in evidence a deed from James P. Pendrey, conveying to him certain property sued for, described by government subdivision and known as the "Jess Myers place." The deed further asserts that it is the purpose of the vendor to convey the Jess Myers place, whether the above description is correct or not; and, should the description prove incorrect, authority is given to vendor's executors or administrators to ascertain the proper subdivisions and execute deed in accordance therewith. In connection with this deed, plaintiff offered testimony to identify the land known as the Jess Myers place; but the court declined to permit such evidence, and on motion of the defendant excluded the deed, whereupon the plaintiff took a non-suit, and afterwards filed a motion to set aside the non-suit, based on the erroneous action of the court as above set out.

M. W. RUSHTON, for appellant. The court erred in refusing to admit the deed and in refusing to admit evidence identifying the land sued for as being a part of the Jesse Myers place.—*E. & P. Mfg. Co. v. Gibson*, 62 Alt. 369; *Woodstock I. W. Co. v. Roberts*, 87 Ala. 441; *Anniston C. L. Co. v. Edmondson*, 127 Ala. 461; *Seymour v. Williams*, 139 Ala. 416; *Steed v. Knowles*, 97 Ala. 578; *Bank v. Webb*, 108 Ala. 131.

POWELL & HAMILTON, for appellee. Where the description in the deed is such as to show that the grantor intended to convey only a specified quantity of land, no more than that quantity will pass.—2 Dev. on Deeds, sec. 1045. A particular description which is clear and explicit and completely identifies the property conveyed cannot be varied or enlarged by a more general and less definite description.—13 Cyc. 631; *Seymour v. Williams*,

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139 Ala. 414. The grantor in the deed was dead and that fact alone rendered the testimony illegal.—Sec. 4007, Code 1907.

DOWDELL, C. J.—Without evidence of identification of the land sued for as being a part of the place “known as the Jess Myers place,” the deed offered in evidence was inadmissible; but with this evidence supplied, and it was permissible to do so by parol testimony, the deed was, in connection with such evidence of identification, admissible. The deed on its face expresses the intention of the grantor to convey the “Jess Myers place,” and such intention should not fail because the government numbers given in the deed do not correspond with the true government numbers of the “Jess Myers place.” In the face of the expressed intention in the deed to convey the land “known as the Jess Myers place,” the government numbers given, failing to correspond, will be regarded as a misdescription.

The trial court committed error in not allowing plaintiff’s evidence of identification of the land sued for as being the “Jess Myers place.” As we have said above, with this evidence in, then the deed offered in evidence is rendered competent.—*Seymour et al. v. Williams*, 139 Ala. 416, 36 South. 187. The question considered appears from the record to be the controlling question in the case, and other assignments of error need not therefore be considered.

For the error indicated, the judgment of the lower court is reversed, and the cause remanded.

Reversed and remanded. All the Justices concur.

[McBride v. Lowe, et al.]

McBride v. Lowe, et al.*Ejectment.*

(Decided February 8, 1912. 57 South. 832.)

1. *Adverse Possession; Deed; Color of Title.*—It is not necessary that a deed be sufficient to pass title in order to render it admissible as color of title; hence, it was not error to admit as color of title, a deed recorded in this state, but executed in another state before a notary public who did not attach the notarial seal.

2. *Same.*—It is not necessary to show that the purported grantor was in possession of the land to render a deed admissible as color of title.

3. *Same; Evidence.*—Where the record of a deed was in evidence as color of title, it was competent for a witness to testify that he went into possession of the land thereunder.

4. *Same.*—The fact that a defendant showed a witness a deed and stated that he was in possession of the land embraced, was not sufficient to prove that the person was in adverse, notorious, open possession.

5. *Same; Tax Deed; Sufficiency.*—A deed which does not describe land is not even color of title, and hence, a tax deed whose description is insufficient is not admissible as evidence of title in ejectment.

6. *Ejectment; Evidence; Statements of Persons Claiming Land.*—While statements which are explanatory of a proven possession are admissible, in ejectment, the fact of possession itself cannot be proven by a statement of a person claiming the land, hence, a question to a witness in ejectment as to whether defendant showed him a deed and stated that he was in possession of the land embraced, was properly excluded.

7. *Evidence; Documentary; Deeds.*—Under section 3374, Code 1907, the original record is admissible though the statute mentions only the transcript of the record, and upon the showing by one of the plaintiffs in ejectment that he did not have possession or custody of the deed in question, the record was properly admitted.

APPPEAL from Lawrence Circuit Court.**Heard before Hon. D. W. SPEAKE.**

Ejectment by W. T. Lowe and others against S. A. McBride. Judgment for plaintiffs and defendant appeals. Affirmed.

[McBride v. Lowe, et al.]

DAVE C. ALMON, for appellant. The deed was inadmissible because made in Jackson county, Alabama, and acknowledged before a Tennessee notary who did not attach his seal. The court erred in admitting the record as section 3374, Code 1907, provides for a certified transcript of the record. The court should have allowed Ready to state that he knew McBride was in possession of the land and claiming it at the time he purchased it.

W. T. LOWE, and TIDWELL & SAMPLE, for appellee. This appeal should be dismissed on the authority of *Johnson, Nesbitt & Co. v. First Nat. Bank*, 145 Ala. 378; *Greenstein v. Bank*, 157 Ala. 536; *Desylva v. Henry*, 4 S. & P. 409; *Fulton v. The State*, 54 South. 165. Counsel do not discuss the merits of the case.

SIMPSON, J.—This suit was brought, as shown by the summons and complaint, by "W. T. Lowe and Tenny Tidwell, partners doing business under the firm name and style of Lowe & Tidwell," against S. A. McBride (it being statutory ejectment to recover lands).

Defendant objected to the introduction of the record of a deed from J. F. Graham and G. F. Graham to T. L. Ready, the record showing that said deed was acknowledged in Tennessee, before a notary public, but not showing that any notarial seal was attached. The court admitted the deed only as color of title. In this there was no error. It is not necessary that the deed be sufficient to pass title to be admitted as color of title (*Henry v. Brown*, 143 Ala. 454-455, 39 South. 325), nor is it necessary to show that the purported grantor was in possession of the land (Id.).

The original record is admissible, although the statute mentions only a transcript of it.

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Secondary evidence can be introduced when "it appears to the court that the original conveyance has been lost, or destroyed, or that the party offering the transcript had not the custody or control thereof."—Code of 1907, § 3374. One of the plaintiffs testified that he did not have possession or custody of the deed.

There was no error in allowing the witness, Ready, to testify that he went into possession of the land under the deed.

There was no error in sustaining plaintiff's objection to the question to Ready as a witness—"Did you not have a conversation with Mr. McBride * * * in which he showed you a deed to 100 acres of this land, and told you that he owned it, and was in possession of it?"

If the object was (as it seems) to prove that at the time Ready bought said McBride was in possession, while it is true that statements explanatory of a possession proven are admissible, yet that is a different thing from proving the possession itself by a statement.

The fact that McBride said he was in possession would not prove that he was in fact in open, notorious adverse possession.

There was no error in refusing to allow the tax deed by the defendant to be introduced in evidence, as the description of the land therein is insufficient; being as follows: "One hundred acres in E. $\frac{1}{2}$ of S. E. $\frac{1}{4}$ and S. W. $\frac{1}{4}$ of S. E. $\frac{1}{4}$, Sec. 29, T. 5, R. 6, lying and being in said county and state." Even as color of title, a deed which does not describe any land is not admissible.—*Rogers v. Keith et al.*, 148 Ala. 225, 228, 32 South. 446.

The judgment of the court is affirmed.

Affirmed. All the Justices concur.

[*Beard v. DuBose.*]

Beard *v.* DuBose.

Ejectment.

(Decided February 8, 1912. 57 South. 703.)

Appeal and Error; Review; Bill of Exceptions.—Where the bill of exceptions does not purport to set out all or substantially all of the evidence, the giving of the affirmative charge was not shown to be error, the presumption being indulged that evidence was introduced by the party in whose favor the verdict was directed, not in conflict with the evidence for the other party, justifying the action of the court.

(Dowdell, C. J., and Sayre, J., dissent.)

APPEAL from Pike Circuit Court.

Heard before Hon. H. A. PEARCE.

Ejectment by J. S. Beard against John DuBose. Judgment for defendant on a directed verdict, and plaintiff appeals. Affirmed.

FOSTER, SAMFORD & CARROLL, and BALL & SAMFORD, for appellant. The only question presented is the right of courtesy in the husband under the statute laws of Alabama, it not being shown that any child was ever born to John and Betty DuBose. The husband takes as a distributee of the wife's estate.—Section 3765, Code 1907. This section is in the Code under the chapter providing for descent and distribution and is a part thereof. The husband then takes an interest in his wife's estate as a distributee.—*Thompson v. Thompson*, 107 Ala. 166; *Marshall v. Crowe*, 29 Ala. 280.

BOYKIN OWENS, for appellee.

McCLELLAN, J.—Statutory ejectment by appellant against appellee to recover a lot in the city of Troy, Ala.

[*Beard v. DuBose.*]

The court gave, at the request of the defendant, the general affirmative charge, with hypothesis, in his behalf.

The bill of exceptions does not purport to set out or to contain all, or even substantially all, of the evidence before the trial court. This being the condition of the bill before the court in the present appeal, the following language of Chief Justice DOWDELL, to be found in *Lewis Land & Lumber Co. v. Interstate L. Co.*, 163 Ala. 592, 593, 50 South. 1036, is apt, and its doctrine is decisive in the premises: "When, on appeal, the bill of exceptions fails to recite that it contains all of the evidence, this court will presume any state of the evidence which will sustain the giving or refusal of an instruction by the trial court." The quoted decision has been accepted as authoritative on the point noted in these subsequent decisions; *Ventress v. Town of Clayton*, 165 Ala. 349, 352, 51 South. 763; *Lamar v. King*, 168 Ala. 285, 289, 53 South. 279. In the last-cited decision (168 Ala. 285, 289, 53 South. 279, 281), it was said: "But, while the bill of exceptions was drawn in a way which indicates with a degree of probability that it contains the evidence upon which the case was tried, there is no formal statement that such is the case nor the equivalent of any such statement. This court has in a great number of cases rigorously applied the rule that, where a bill of exceptions fails affirmatively to show that it contains all the evidence, any state of the evidence will be presumed to uphold the rulings of the trial court. A case especially in point is *Southern Mutual Ins. Co. v. Holcombe*, 35 Ala. 327, followed recently in *Lewis Land & Lumber Co. v. Interstate L. Co.*, 163 Ala. 592 [50 South. 1036]."¹ The rule quoted ante is aptly supported by the following, among other, decisions delivered here: *Barnes v. Mobley*, 21 Ala. 232;

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Bradley v. Andress, 30 Ala. 80, 82; *Lovett v. Chisolm*, 30 Ala. 88, 90; *Stein v. Feltheimer*, 31 Ala. 57, 58; *Com'r's v. Godwin*, 30 Ala. 242, 244; *Wyatt v. Stewart*, 34 Ala. 716, 721, 722; *Taylor v. McElrath*, 35 Ala. 330, 333; *Alexander v. Alexander*, 71 Ala. 297; *M. & E. Ry. Co. v. Kolb*, 73 Ala. 405, 49 Am. Rep. 54; *Keep v. Kelly*, 29 Ala. 322, 324; *Postal Tel. Co. v. Hulsey*, 115 Ala. 193, 207, 22 South. 854; *Shafer v. Hausman*, 139 Ala. 240, 35 South. 691 (wherfrom the language in *Lewis Land & Lumber Co. v. Interstate L. Co., supra*, was taken); *Sanders v. Stein*, 128 Ala. 633; 634, 29 South. 586.

Applying, as must be done, the quoted rule to this appeal, error in the giving of the affirmative charge stated—the only assignment of error made—is not shown to have been committed.

It is suggested that the holding in *Baker v. Patterson*, 171 Ala. 88; 55 South. 135, requires a different conclusion. The writer having dissented therefrom, expressing at length his views upon the matter therein discussed, Justice ANDERSON, who did not concur therein, has kindly written for the court in response to the suggestion stated, and so, as follows: "The majority of the court concur in the opinion, but do not wish to be understood as expressly or indirectly overruling the recent case of *Baker v. Patterson*, 171 Ala. 88, 55 South. 135. They think that there is a broad distinction between said case and the case at bar. In the *Patterson Case, supra*, there was the demand and a general denial of same—no special defense whatever; the only issue being the existence vel non of plaintiff's claim as set out in the complaint. Therefore, under the issue as made by the pleading, and upon which the trial was had, it matters not what facts additional to those disclosed by the bill of exceptions either party may have

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proved, there would necessarily be a conflict as to the real and only issue, and which would make the giving of the general charge improper. In other words, there was a conflict in the evidence upon the one material fact in the case, and whatever else may have been proven under said issue there would still remain a conflict, and thus make the decision of the case a question for the jury, and not for the court, by giving the general affirmative charge. Here we have a different case. The bill of exceptions does not disclose all of the evidence, and the defendant may have introduced evidence which might not have conflicted with the plaintiff's evidence, and yet it may have established a complete and undisputed defense to the plaintiff's action. The action was ejectment, and under the general issue the defendant had the right to defeat the plaintiff's recovery by showing that he did not have the title, and which could have been done without disputing or contradicting any of the plaintiff's evidence. The plaintiff proved certain facts to establish title, and these facts may have all been true; yet the defendant may have shown that he had acquired a title through a superior source to that of the decedent, Betsie Du Bose, and through whom the plaintiff claims title to the land, and there was nothing in the record to show that the defendant was claiming under a common source. He was the husband of Betsie Du Bose, it is true, but he did not, under the record, claim the land solely and only by the marital right to same; but, from aught that appears, he may have had a superior title to that of his wife's, and which may have been shown without disputing the plaintiff's evidence in the slightest, or he may have had a deed from her, made before her death."

In the writer's opinion, the statement of Justice ANDERSON that "there is a broad distinction between

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said case [*Baker v. Patterson*] and the case at bar" is obviously correct; for in that case a *conflict* in the evidence appeared, whereas in the case at bar no conflict appears.

Affirmed.

- SIMPSON, ANDERSON, MAYFIELD, and SOMERVILLE, JJ., concur. DOWDELL, C. J., and SAYRE, J., dissent.

SAYRE, J.—(Dissenting.)—On reflection, I am not so sure that the case of *Baker v. Patterson*, ought to control this case. I am sure, however, that the opinion in that case has not been understood according to its plain meaning. In that case there was no conflict in the evidence, but the trial judge, misunderstanding the legal effect of undisputed facts, gave the affirmative charge for the plaintiff, whereas, the defendant should have had it on request. It was said that this was error for the reason that, "as long as the evidence shown by the bill of exceptions to have been offered by the parties is allowed to stand as identifying the issues of fact between the parties and constituting at least a part of the evidence upon which those issues were determined, the only effect of presuming other evidence favorable to the plaintiff, will be to establish a case of conflict," in which case the general charge would still be erroneous.

[*Brue v. McMillan.*]

Brue *v.* McMillan.

Ejectment.

(Decided January 18, 1912. 57 South. 486.)

1. *Bill of Exceptions; Signing; Place.*—The judge of the law and equity court of Mobile had authority to sign a bill of exceptions while temporarily outside of Mobile county, in view of section 3300, Code 1907, and Acts 1907, p. 582.

2. *Evidence; Documentary Evidence; Retroactive Statutes; Curative Acts.*—The plaintiff objected to defendant's offer as evidence of title of a patent dated February 20, 1872, purporting to have been executed by the Governor by his secretary, on the ground that the patent had not been executed by the Governor, and was not sealed with the great seal of the state, which objection was good at the time it was made. The court took the objections under advisement, and continued the hearing, and before ruling on the objection, Acts 1911, p. 192, was passed and approved. Held, that although the objection was well founded when taken, courts are bound to apply the law as it exists at the time the ruling was made, and that as the statute curing the defects went into effect from the moment of its approval, and before the ruling on the objection, the objection was properly overruled.

3. *Same; Recital in Patent; Effect.*—Recitals in a state patent to swamp lands that a certificate of the receiver of the swamp and overflow lands of the state of Alabama, in and for the district of Mobile, had been deposited in the office of the Secretary of State, whereby it appeared that full payment for the lands had been made by the patentee according to the Acts of February 8, 1861, were of no consequence in this case, as evidence of the fact of payment, as plaintiff was not affected by them, but by the state's conveyance of title which it had power to make on any consideration deemed proper.

4. *Evidence; Location of Land; Map.*—A certified copy of a map on file in the office of the State Land Office, the original bearing date of 1871, was admissible for the purpose of locating the land in controversy.

5. *Appeal and Error; Harmless Error; Evidence.*—Since by the express provision of Acts 1911, p. 192, the patent to swamp lands executed by the Governor by his secretary on February 20, 1872, constitutes *prima facie* evidence of title, certified copies of entries in the books kept by the state treasury to show payments of the price of land in question by the patentee, were not prejudicial to plaintiff, as plaintiff did not rely on defendant's inability to prove payment of the purchase price of the lands to the state, and the state having the power to validate the patent upon any consideration deemed by it to be proper.

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APPEAL from Mobile Law and Equity Court.

Heard before Hon. SAFFOLD BERNEY.

Ejectment by T. E. Brue against Thomas N. McMillan. Judgment for defendant and plaintiff appeals. Affirmed.

RICH & HAMILTON, for appellant. The patent was not properly executed and was void, and hence, the court erred in permitting defendant to introduce the patent purporting to have been executed by the Governor by his secretary.—*So. Ry. v. Cleveland*, 53 South. 767. Under the evidence, the patent must have had the effect to avail defendant as a valid evidence of title.—*Hughes v. Anderson*, 79 Ala. 209. A subsequent act cannot alter the law as it existed on the day of the trial, and hence, the court was in error in overruling the objection to the patent, although the ruling was not made until after the passage of the act approved April 4, 1911.—*Cutrell v. The State*, 42 South. 609; 36 Cyc. 1218. This act does not help in any event, as there is nothing to indicate that Chardavoyne was private secretary to the Governor, and the courts will not take judicial knowledge thereof.—*Crawford v. The State*, 57 N. E. 931; *Ward v. Henry*, 59 Wis. 76; Greenl. Evid. sec. 6a. Counsel discuss the validity of the Act of April 4, 1911, but in view of the opinion it is not deemed necessary to here set them out. Although the legislature has the right to prescribe what should be *prima facie* evidence that right is subject to the qualification that in doing so it shall not take away plaintiff's cause of action, or destroy a defense after a suit has been begun.—*M. J. & K. C. R. R. Co. v. Turnipseed*, 219 U. S. 35. Counsel also discuss the constitutionality of the Act of February 12, 1879, but in view of the opinion it is not deemed necessary to here set them out. The map

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was inadmissible.—*So. Ry. v. Cleveland, supra.* On the same authority the certified copy of the entries on the state treasury book were inadmissible. On motion to strike bill of exceptions and as an authority against said motion counsel cite Acts 1907, p. 562, section 3300, Code 1907; *Ex parte Nelson*, 62 Ala. 376; 85 Pac. 97; 83 Pac. 423.

R. P. ROACH, for appellee. On motion to strike bill of exceptions and as an authority for the motion counsel cites *E. A. L. M. Co. v. Peebles*, 102 Ala. 244; *Raney v. Ridgeway*, 151 Ala. 333; *Gryder v. Talley*, 77 Ala. 424; Cyc. 160. On the merits counsel insists that the record shows that appellee and his predecesosrs in title have had adverse possesison of the land for more than twenty years.—*Goodson v. Brothers*, 111 Ala. 589; *So. Ry. v. Cleveland*, 53 South. 768. Since the passage of the Acts of April 4, 1911, the case of *Sou. Ry. v. Cleveland* is no longer an authority as to the recitals in said patent of the payment of the purchase money not being legal evidence. The Act of 1911, p. 162, became operative immediately upon its passage.—2 Ala. 26; 8 Port. 174; 8 Ala. 119; 6 Ala. 579; 39 Ala. 696; 101 Ala. 594. The act applied to the patent introduced by defendant and rendered it a muniment of title.—*Jordan v. McClure L. Co.*, 54 South. 422; *Sloss-S. S. & I. Co. v. Lollar*, 54 South. 273; 16 Cyc. 1075; 8 A. & E. Enc. of Law, 729; 3 Wig. sec. 2144. Counsel cite authority upholding the constitutionality of the act in question, but in view of the opinion it is not deemed necessary to here set them out. This was also true of the act of 1879.

SAYRE, J.—The judge of the law and equity court of Mobile, a court exercising jurisdiction in Mobile county only, signed the bill of exceptions in this case while in

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Clarke county, and this fact gives appellee occasion for a motion to strike. In *Rainey v. Ridgeway*, 151 Ala. 532, 43 South. 843, decided at a time when, under the statute, judges might extend the time for signing bills of exception, the bill was stricken, because the judge of probate made the order extending the time for a bill while absent from his county; this on the ground that the judicial power of probate judges is limited to the territory of the counties in which they are elected. On the other hand, it was held, in *Ex parte Nelson*, 62 Ala. 376, that a circuit judge might validate a bill of exceptions while in a circuit different from that in which the trial was had; this for the reason that his jurisdiction is co-extensive with the state. Circuit judges have the same official authority and power in one county as in another. The judge of the law and equity court of Mobile has and exercises all the jurisdiction and the powers which are exercised by judges of the circuit court.—Act of August 6, 1907 (Sess. Acts 1907, p. 562). He may, when deemed expedient by him and the circuit judge, or when directed by the Governor in writing, sit upon the circuit bench in any county in this state. Code, § 3300. He had, therefore, authority to sign the bill of exceptions when and where he did, and the motion to strike must be overruled.

Objections taken and elaborately argued against the constitutional validity of the act of February 12, 1879, entitled "An act to further regulate the securing, preservation and sales of the swamp and overflowed lands of the state" (Acts 1878-79, p. 198), and the act of April 4, 1911, entitled "An act to authorize the introduction in evidence of documents executed prior to February 12th, 1879, by the Governor in person or in his name by his secretary, purporting to convey any of the state's lands, but ineffective as conveyances, and certified

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copies of the record of any such documents which have been recorded for as much as twenty years, and to prescribe the probative effect of such documents and copies," (Gen. Acts 1911, p. 192,) have been recently considered at length by this court, as to the first-named act, in *Jordan v. McClure Lumber Co.*, 170 Ala. 289, 54 South. 415; as to the second, in *Brannan v. Henry, Infra*, 57 South. 967. We find no occasion for a repetition of what was said in those cases.

This case, like those to which we have just referred, involved the title to a part of what were the swamp and overflowed lands patented to the state by the government of the United States. The trial was by the court; no jury having been demanded. Evidence was offered by the parties during the 28th and 29th days of March, 1911. Defendant offered as evidence of title a patent of date February 20, 1872, purporting to convey the state's title to the Mobile & Ohio Railroad Company, as assignee of James Dunbar. This patent purported to have been executed by Robt. B. Lindsay, Governor of Alabama, by W. V. Chardavoyne, secretary, and recited that there had been deposited in the office of the Secretary of State a certificate of the receiver of the swamp and overflowed lands of Alabama, in and for the district of Mobile, whereby it appeared that full payment for the land had been made by James Dunbar according to the act of February 8, 1861 (Laws 1861, p. 12). To this patent and its recitals, the plaintiff (appellant) objected, on the ground that the patent had not been executed by the Governor; nor was it sealed with the great seal of the state, as required by the Constitution. To the recitals, the objection was taken that there was no authority in law for the Governor's secretary, by whom the Governor's name had been signed to the patent, to bind the state, or any one, by

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the statement of the facts recited. The court took these objections under advisement, and proceeded with the hearing. On April 7th next, the court announced that plaintiff's objections were overruled, and rendered judgment for the defendant. To this ruling and to the judgment, plaintiff reserved exceptions. In the meantime, the act of April 4, 1911, had been approved. When the objection was taken to the patent as evidence of title, it was well grounded in law and fact. As color of title, in connection with act of possession and ownership, it was at all times admissible, and when the ruling was announced the objection to the patent as a muniment of title had been removed by the statute. As was held in *Brannan v. Henry, supra*, under the act of 1879, the patent of 1872 became in effect a transfer of the state's original title, undisputed in this case, upon condition that the purchase money had been paid, and, under the act of 1911, it became in effect a deed subject to be defeated on proof that the purchase money had not been paid. For reasons stated in that case, the curative effect of those statutes and the rule of evidence enacted by them were operative in this case. The statute of 1911 became effective from the moment of its approval. The ruling must be judged on its merits as of the time it was made. The trial court properly overruled plaintiff's objection to the patent for want of proper execution. The recitals of the patent were of no consequence in this case as evidence of the fact of payment. Their presence in the patent, purporting to have been issued by the Governor, or his secretary, was taken by the state as sufficient reason for the ratification and conveyance of title, which it had power to make on any consideration deemed proper. The statute of 1911 was based upon the assumption of fact, morally and legally justi-

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fiable, that the patent of 1872 spoke the truth of the transaction to which it related.

A certified copy of a map on file in the office of the state land agent, the original bearing date in 1871, was introduced in evidence for the purpose, perhaps, of locating the land in controversy. In this there was no error.—*Barker v. Mobile Electric Co.*, 173 Ala. 28, 55 South. 364.

Certified copies of entries in the books kept by the State Treasurer, going to show payments for swamp and overflowed lands, and notations in the map book in the office of the state land agent, made on the page opposite to the map, and going to show a sale of the land in controversy to James Dunbar, were admitted for the purpose, no doubt, of showing a sale to said Dunbar and payment of the purchase money into the treasury of the state. Defendant showed a complete, unbroken chain of title, undenied in fact, though its effect in law was controverted, reaching back to the Mobile & Ohio Railroad Company, assignee of Dunbar. There was no effort on the part of the plaintiff to show that Dunbar had not in fact paid the purchase money. Plaintiff's reliance was upon the defendant's inability to prove payment. If, for any reason, there was error in the admission of the certificates and the notations from the map book, it was harmless; for, under the statute of 1911, the patent became *prima facie* evidence of title in the defendant. There being no attempt to defeat the title thus shown by the production of evidence that the purchase money had not in fact been paid into the state treasury, this patent became conclusive of the case. Defendant's right and title thereunder was not affected by subsequent grants to the plaintiff.—*Bates v. Herron*, 35 Ala. 117; *Tapia v. Williams*, 172 Ala. 18, 54 South. 613.

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There were objections to the several links in the chain of title by which the defendant connected himself with the Mobile & Ohio Railroad Company. These objections were based upon the proposition that the state's patent to that company was ineffectual as a conveyance of title. This contention has been disposed of by what has been here said, and by what may be found in *Brannan v. Henry, supra*.

We find no error in the record; the judgment is affirmed.

Affirmed. All the Justices concur, except DOWDELL, C. J., not sitting.

MCCLELLAN, J.—(concurring).—On the appeal in *Brannan v. Henry, Infra*, 57 South. 967, I have attached my view of an expression therein used, which recurs, in substance, in the above opinion, with respect to the effect of the Acts of 1879 and of 1911. Reference is therefore made to that appeal.

Busbee, et al. v. Thomas, et al.

Ejectment.

(Decided January 18, 1912. 57 South. 587.)

1. *Ejectment; Evidence; Identification.*—In ejectment a plaintiff must identify the tract sued for with that described in a deed introduced as evidence of title; and where the description in the deed was by monuments and boundaries, it was necessary to locate such monuments and boundaries by competent evidence.

2. *Same.*—Possession under an ancient deed for more than fifty years is strong evidence that original boundaries mentioned in the deed are those of the land possessed.

3. *Same.*—The evidence examined and held sufficient to support a finding that the boundaries and monuments mentioned in an ancient deed introduced as evidence of title were the same as those of the tracts sued for.

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4. *Same.*—A question put to a witness in ejectment as to whether plaintiffs had exercised any acts of ownership over any of the land in suit, or anything else, in the last twenty-five years was objectionable as calling for matters outside the issue.

5. *Deeds; Property Conveyed; Certainty of Description.*—Where a deed locates land by monuments, courses and distances with a beginning point that is fixed and certain, and fixes the termini of the several boundaries, which are the corners of the tract, by stakes and intersection with a known section line, though it does not specify the distances, it is *prima facie* certain and admissible as evidence of title.

6. *Same; Construction; Power to Lay Off.*—Where the land to be taken was definitely described by monuments, boundaries and corners, it is not invalid as a grant of power to lay off land, which has never been exercised, though the deed states that the grantees are to have ten acres "as they want it."

7. *Boundaries; Evidence; Deeds.*—Where plaintiffs in ejectment relied on an ancient deed as evidence of title, and the defendants attacked the deed for uncertainty of description, and a witness testified that he had lived in the neighborhood of the land practically all of his life, that the original trustees under whom the plaintiff claimed were in possession of the tract before the war, and that he had seen a stake at the northeast corner frequently prior to 1860, it was for the jury, under the latitude allowed in proof of ancient boundaries, to say whether or not this stake was the stake referred to in the deed.

8. *Same; Conflicting Elements; Quantity.*—Neither weight nor effect will be given a description of a deed in terms of quantity, except for the purpose of relieving some otherwise irremediable ambiguity in the more particular description, and the specific description will control although the description by monument, corners and boundaries contains more than the amount specified by acres.

9. *Charities; Trustees; Capacity to Sue.*—Where the trustees of a school bring ejectment and are shown by the minutes of the school board to have been elected as such according to the terms of the deed under which they held, that they were serving in that capacity, and had been appointed as such by a regular and valid order of a register in chancery, under sections 6098, 6099, Code 1907, they were sufficiently qualified to bring such suit for lands conveyed as a charitable donation to the trustees of the school.

10. *Same; Election; Collateral Attack.*—Although the election of the trustees of a school may have been voidable at the instance of the cestui que trust, it was not void, and hence, could not be assailed collaterally by attacking the capacity of such trustees in an ejectment suit for property conveyed in trust for the benefit of the school.

11. *Same.*—Although the election of the trustees under a deed of land for the maintenance of a school was not strictly regular, yet it cannot be declared void so as to incapacitate such trustees to bring ejectment to recover the trust property, where there was no fraud, and the election had remained unquestioned for a number of years.

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12. *Same; Appointment.*—Where the appointment of trustees under a deed to land for the maintenance of a school is neither void nor voidable their later appointment by a register in chancery under statutory regulation was void for want of jurisdiction, for, where the creator of a trust has provided a method for filling vacancies, and it is possible to so fill them, no other method is applicable, general provisions of law notwithstanding.

13. *Evidence; Conclusions.*—Acts of ownership are statements of collective fact, and a witness with a personal knowledge of the subject matter may testify whether a party has exercised acts of ownership over the land in suit in the last twenty-five years, without his testimony being objectionable as an opinion or conclusion.

14. *Same; Hearsay; Common Reputation.*—Because of its hearsay character, common reputation is not admissible in ejectment to prove the number of acres in the tract in suit.

15. *Witnesses; Examination; Repetition.*—Where a witness has stated fully and freely his knowledge of a matter inquired about, the refusal to allow a repetition of his testimony as to that fact is not error.

16. *Appeal and Error; Harmless Error; Evidence.*—Where the capacity of plaintiff was otherwise shown by uncontroverted evidence, it is not prejudicial error to admit proceedings and a void order of a register in chancery appointing such plaintiffs as trustees, the action being ejectment by such trustees as plaintiffs.

17. *Same; Instructions.*—It is not reversible error to give abstract instructions unless it clearly appears that the giving of the same was prejudicial.

18. *Same; Assignment; Waiver.*—The failure to argue or insist upon refused charges is a waiver of such assignment of error.

APPEAL from Coosa Circuit Court.

Heard before Hon. H. P. MERRITT, Special Judge.

Ejectment by E. W. Thomas and others, as trustees, against Lafayette L. Busbee and others. Judgment for plaintiffs, and defendants appeal. Affirmed.

The oral charge of the court, excepted to, is as follows: "I charged you as a matter of law this morning that the boundaries govern, and that is still my charge to you. I simply reiterate that, where a deed sets out the boundaries and courses and distances, you must follow the boundaries, and even though it may name a certain number of acres, and according to the boundaries there will be a larger number of acres than named, the boundaries control."

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The following charges were refused to defendant:

(2) "I charge you that, unless you are reasonably satisfied from all the evidence in this case that the original trustees under the deed from Bradford and wife to said trustees laid off the land conveyed or attempted to be conveyed therein, and established the stakes therein specified, then the instrument is void, and cannot serve as a muniment of title." (3) "I charge you that, under the deed of Bradford and wife to the school trustees, it was necessary for the said trustees to lay off same within a reasonable time, and if they fail to do so, and have never done so, then the deed is void for uncertainty." (6) "I charge you that plaintiff cannot recover more than 10 acres of land under this deed of Bradford and wife to the trustees." (7) "I charge you that unless you are reasonably satisfied, from all the evidence in this case, that the original trustee under the deed from Bradford and wife, or their successors in office, laid off the land as directed by said deed, then you must find for the defendant." (8) "I charge you no survey by subsequent township trustees or district trustees could put into operation the deed of Bradford and wife to the school trustees; but, for the deed to have been made operative, it was necessary for the trustees of the property under the deed to lay it off, and, if they have not done so, you should find the issue in favor of the defendant." (9) "I charge you that the plaintiff cannot recover, unless you are reasonably satisfied from all the evidence that the original trustees under the deed from Bradford and wife laid off the land described in said deed, and that the tract as laid off contained not exceeding ten acres." (10) "I charge you that the courses and distances are not sufficiently described in said deed, so as to make the deed sufficiently certain." (11) "I charge you that the plaintiff cannot recover in

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this action, unless you are reasonably satisfied from all the evidence that the original trustees under the deed from Bradford and wife to James A. Kelly and others laid off the lands described in said deed." (12) "I charge you that if you are reasonably satisfied, from all the evidence in this case, that it was the intention of Bradford and wife to convey only 10 acres to the school trustees, then plaintiff cannot recover the full amount of acres sued for."

RIDDLE, ELLIS, RIDDLE & PRUET, for appellant. The deed which conveys no particular spot of ground can convey no title.—6 Am. Dec. 666; 51 Am. Dec. 726. A deed conveying a specified parcel of land out of a larger tract is void if the location of the tract granted cannot be certainly ascertained.—29 South. 766; 84 Am. St. Rep. 652. Construction of deeds must be with the view and endeavor to give every part of it a meaning.—94 Am. Dec. 363. Parts of a deed inconsistent with the manifest intent of the grantor will be rejected.—27 Am. Dec. 554. Counsel discuss the charges refused but without citation of authority.

WHITSON & HARRISON, for appellee. Stakes are lost with the lapse of years, but where it cannot be otherwise established as to the division line, the stakes will govern.—4 A. & E. Enc. of aw, 778. Deeds in artificially drawn will be construed with greater latitude than when skillfully drawn.—*Campbell v. Gilbert*, 57 Ala. 570. Conveyances by metes and bounds will carry all the land within them, although it exceeds or falls short of the quantity specified.—4 A. & E. Enc. of Law, 763. Effect must be given to the intention of the parties, and the instrument must be construed in the light of the situation of the contracting parties at the time the deed

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was made.—4 A. & E. Enc. of Law, 793-796; 45 Am. Dec. 745. It is only in the absence of monuments, courses and distances that the quantity of the land named in the deed will govern.—141 Fed. 711; 138 Ind. 297. Distances in description must always yield to fixed boundaries which are clearly and certainly established.—*Page v. Whatley*, 50 South. 116. Parol evidence is admissible for this purpose.—*Chambers v. Ringstaff*, 69 Ala. 140. The deed was not void for uncertainty.—*Dorgan v. Week*, 86 Ala. 329; *Homan v. Stewart*, 103 Ala. 650; *Cottingham v. Hill*, 119 Ala. 353. The creator of the trust may provide a method for filling vacancies.—26 A. & E. Enc. of Law, 964. The trustees were therefore entitled to maintain suit.—*Stewart v. White*, 128 Ala. 208. Their appointment or election could not be collaterally attacked.—*Gaines v. Harvin*, 19 Ala. 491; *Griffin v. Stoddard*, 12 Ala. 783.

SOMERVILLE, J.—The appellees sued the appellants in ejectment, and had verdict and judgment for the land sued for.

The issue in the trial court and on this appeal hinges upon the proper interpretation of the deed offered by plaintiffs in support of their title. This deed was executed in 1853 by the owner, one Bradford, to one Kelly and others, as trustees, principally for the maintenance of a school, and in part for other charitable uses. The plaintiffs constitute the present board of trustees, claiming in succession to those originally named in the grant. The deed conveys "the following described lot of land lying and being in the county of Coosa and state of Alabama, and being a part of section eight in township twenty-three and range twenty east, in the Tallapoosa land district, containing and bounded as follows; to wit: *Beginning at the line of section eight*

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where said line strikes Socapatoy creek; thence down the north bank of said creek to a stake; thence due north to a stake; thence east to a stake in said section line; thence south with said line to the beginning. Said lines to be run so as to contain ten acres, and the academy, and said trustees are to have said ten acres run so it contains the academy and the Baptist Church and ten acres of land as they want it."

The evidence shows with reasonable certainty that at the time of the grant in question an academy building stood near the southwest corner of the tract sued for, and a Baptist Church near the northeast corner; that for about 50 years past the tract has been commonly known as the "Bradford Academy Lot," and its boundaries and corners have been identified and well known to a number of people living in the neighborhood; that the entire tract contains about 17 acres; and that rectangular lines running from the eastern and southern boundaries (as fixed by the deed), so as to barely include the academy and church buildings as they originally stood, would inclose about 13 acres.

Defendants objected to the introduction of the Bradford deed, on the grounds (1) that it was void for uncertainty of description; (2) because it vested in the trustees merely a power to lay off 10 acres, as they pleased, so as to include the academy and church, and this power has never been executed; and (3) because it was not shown that plaintiffs are the persons who can recover under the deed.

The rules of interpretation which declare the primacy and effect of variant modes of description in deeds have been too often stated to permit of repetition here. It is obvious that the deed before us fully describes the tract of land intended to be conveyed by monuments, courses, and boundaries, located with reference to a beginning

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point that is fixed and certain, by means of which the entire tract can, or could originally, be definitely pointed out. It is true that distances are not specified; but the termini of the several boundaries, which are, of course, the corners of the tract, are fixed as to the western corners by stakes on the specified courses, and as to the eastern corners by the intersection of the courses with a known section line. The deed was therefore *prima facie* certain as to the land conveyed, and clearly admissible in evidence. It, of course, devolved on the plaintiffs to show the identity of the tract thus described with the tract sued for; and in doing this it was necessary by competent evidence to locate the monuments and boundaries set forth in the deed. As to this, the only points of real controversy were with respect to the two stakes which indicated the southwestern and northwestern corners, and with respect to the actual location of the western and northern boundaries.

H. R. Robbins, 64 years old, testified that he had lived in the neighborhood of the land practically all his life; that he attended school there as a boy; that he knew the original trustees; and that they were in possession of the tract of land sued for when he first knew it before the War, when it was used for school, church, and cemetery purposes.

In the absence of any surviving monuments at all, an ancient possession under an ancient deed might be sufficient evidence of the original boundaries mentioned in the deed; and when such possession continues uninterruptedly for nearly half a century the fact becomes very cogent indeed.—*Owen v. Bartholomew*, 9 Pick. (Mass.) 520; *Aldrich v. Griffith*, 66 Vt. 390, 29 Atl. 376.

But Robbins goes further and testifies to the presence of a stake at the northwest corner, which he had frequently seen when a schoolboy, prior, we may fairly

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assume, to the year 1860. Much latitude must be allowed in the proof of ancient boundaries, and it was clearly for the jury to say, from all the circumstances before them, whether this stake was the stake referred to in the deed.

It will be noted that, since the southwest corner and the lines of the southern and eastern boundaries were certainly known, and since the western and northern boundaries ran with the point of the compass and at right angles to each other, the location of the northwest corner would suffice to complete and close the entire boundary on all the four sides.

W. T. Smith, son of one of the original trustees, testified that he saw an iron post placed at the northwest corner more than 40 years ago; that about 30 years ago his father and one McKinney, who was also one of the original trustees, pointed out to him on the land the corners and marked boundaries of the academy lot, which were the same as those now claimed by the plaintiffs. These boundaries were also shown to have been commonly known in the community for, perhaps, a generation or more.

This, and much other testimony of a similar nature, however strongly disputed, necessarily carried to the jury the issue of the identification of the land, and was sufficient in this aspect to support a verdict for the plaintiffs.—*C. & G. Ry. Co. v. Pilcher*, 163 Ala. 401, 51 South. 11.

Whatever notion the grantor, Bradford, or the trustees, or any one else, may have had as to the number of acres contained in the tract he granted by specific boundaries is wholly immaterial. Even had he expressly declared an intention to convey only 10 acres, it would be unavailing to limit or qualify his definite description of the grant by monuments, corners and boun-

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daries. This is a fixed rule of construction, and a rule of property as old as the common law; and neither weight nor effect is ever given to a description in terms of quantity, except for the purpose of relieving some otherwise irremediable ambiguity in the more particular description.—*Page v. Whatley*, 162 Ala. 473, 50 South. 116; *S. C. Cement Co. v. U. L. Cement Co.*, 138 Ind. 297, 37 N. E. 721. But we discover in the grantor's allusions to quantity no more than a mere estimate of the probable acreage of the tract; and, having regard to his plain purpose, we think he intended to limit the area downward, rather than upward. In any case, however, this specification must yield to the boundaries actually named.

The right of the plaintiffs to sue in the capacity of trustees was duly and reasonably shown. They were elected as such, as shown by the minutes of the board, and were serving in that capacity. If this were not enough, they were also appointed as such by a regular and valid order of the register in chancery, upon proceedings which were instituted and conducted in accordance with the statutes therefor provided. Sections 6098, 6099, Code 1907.

We are of the opinion, however, that the election of these trustees by even a minority of the full membership of the board, a majority of the membership being vacant, was not void, though the exercise of the power conferred by the deed to fill ensuing vacancies may have been conferred on a majority of the board. And we further hold that, even if such election were voidable at the instance of the cestuis que trustent, it could not be thus assailed by strangers thereto in a collateral proceeding. See *Gaines v. Harvin*, 19 Ala. 491, 498. Nor should such election, though not strictly regular, be declared void where there has been no fraud, and where

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it has remained unquestioned for many years.—28 Am. & Eng. Ency. Law (2d Ed.) 966. The result of this view would render the register's appointments unnecessary, and therefore void for the want of jurisdiction; the rule being that, where the creator of the trust has provided a method for the filling of vacancies, this method will be carried out whenever possible, and vacancies can be filled in no other way, general provisions of law notwithstanding.—28 Am. & Eng. Ency. Law (2 Ed.) 965. Nevertheless, the admission of the proceedings and order in evidence was without prejudice to the defendants, since the capacity of the plaintiffs was otherwise sufficiently shown, and there was no conflict in the evidence with respect thereto.

Defendants asked their witness Selman, "Have the school trustees exercised any acts of ownership over any of that land or the academy, or anything else, in the last 25 years?" Objection to the question was sustained by the trial court. Acts of ownership are collective facts, and the form of this question was not objectionable, as calling for the witness' opinion or conclusion.—*Woodstock Iron Co. v. Roberts*, 87 Ala. 436, 6 South. 349. Nor, in view of some of the testimony introduced for plaintiffs, was the witness' negation of such acts other than rightful and proper. There are three reasons, however, any one of which might justify the rejection of the question: (1) It does not appear that the witness was qualified by any sufficient personal knowledge of the subject-matter of the inquiry to answer so sweeping a question; (2) the inquiry as to acts of ownership over "anything else" than the premises in dispute was outside the issue, and therefore irrelevant; and, (3) it conclusively appears from the bill of exceptions that this witness, in his testimony actually given, told all he knew about the trustees and their

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acts of ownership and control over the land, and, indeed, specifically answered in the negative this very inquiry, a duplication of which was not a matter of right in the defendants.

For the reason last stated, the questions to the same witness, as to acts of ownership on the part of the trustees over that part of the land lying between the graveyard and Garrett's creek, were rejected without prejudice to defendants. The testimony of the witness to which we above refer will be found in the reporter's statement of the case.

Common reputation as to the number of acres in the academy tract was not admissible to prove that fact, even if the fact were relevant. It was but hearsay, and does not fall within any exception to the rule of exclusion.

That part of the court's oral charge to which exception was taken correctly stated the law, though its allusion to *distances* was abstract, so far as the present deed is concerned. This, however, as often declared, is not reversible error.

Charges 2, 3, 6, 7, 8, 9, and 11, refused to defendants, are framed on the mistaken theory that the Bradford deed vested in the trustees only a power to lay off 10 acres of land, in default of which they had taken nothing under the deed.

Charges 4, 5, and 6, not being argued, do not merit discussion.

Charge 10, that the corners and distances are not sufficiently described in the deed, is opposed to the views which we have declared on that subject.

Charge 12, also, is opposed to our ruling that Bradford's intention to convey only 10 acres was immaterial in the face of the specific description of the land conveyed.

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We find no error in the record prejudicial to appellants, and the judgment is affirmed.

Affirmed. All the Justices concur, except DOWDELL, C. J., not sitting.

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Ejectment.

(Decided February 6, 1912. 57 South. 972.)

1. *Appal and Error; Review.*—A plea of not guilty or a plea since the last continuance being the only proper pleas in ejectment, the action of the court on motion to strike and demurrer to special pleas will not be considered on appeal where a case was tried and a verdict rendered for defendant on the plea of not guilty.

2. *Judgment; Entry.*—The records of courts import absolute verity and cannot be contradicted by parol; hence, in ejectment parol testimony was not admissible to show that a decree of condemnation, under which the defendant claimed, was written on the record by the judge before whom the proceedings were had after the expiration of his term of office upon the misplacement of the final decree, especially where the record on its face showed that the decree was rendered and entered within the time prescribed, and on a date during the term of the judge.

3. *Ejectment; Process; Notice to Landlord.*—Under section 3840, and section 3844, Code 1907, the landlord simply becomes a party, but not the sole party to the suit, hence, though a tenant suggested his landlord as a party, the tenant remained a party, and where during the pendency of the suit the landlord conveys the premises to the tenant, the tenant could still defend under the title granted.

4. *Eminent Domain; Proceedings; Collateral Attack.*—That a petition for the condemnation of land was addressed to the probate judge instead of to the probate court (section 3889, Code 1907,) cannot be asserted in ejectment to affect the validity of the title of one who claims thereunder.

5. *Same.*—While the petition and condemnation proceedings must state the jurisdictional facts, defects which would be fatal on demurrer or other direct attack upon the petition are not fatal when collaterally attacked where the rule of presumption of regularity obtains; hence, though such petition does not mention the age and residence of the party owning land sought to be condemned, the final decree showing that the amount of condemnation money was paid, the petition was sufficient against attack in ejectment, against one claiming under condemnation, especially where it appears that sum-

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mons was served on such party, and his own testimony showed that he was over twenty years of age.

6. *Same; Proceedings; Petition.*—The petition held to sufficiently show that the condemnation proceedings was in the probate court and were sufficient under the requirement that the proceeding be addressed to the probate court. (Section 3889, Code 1907.)

7. *Same; Raising a Dam; Petition.*—Under section 3904, Code 1907, one who had commenced the erection of a dam without authority of law could only proceed to raise a dam as though he had no dam, and the fact that his petition was to establish a dam would not render the condemnation proceedings void.

APPEAL from Cherokee Circuit Court.

Heard before Hon. W. W. HARALSON.

Ejectment by E. Leath against E. Cobia and others.
Judgment for defendant and plaintiffs appeal. Affirmed.

BURNETT, HOOD & MURPHREE, for appellant. The court erred in overruling plaintiff's demurrers to pleas 1 and motions to strike filed by plaintiff.—7 Enc. P. & P. 238; *People v. River R. Co.*, 12 Mich; *Richardson v. Stephenson*, 114 Ala. 238; *Zirkle v. Jones*, 129 Ala. 444. The documents relied on as a defense were void and the court erred in admitting them in evidence.—Secs. 3888, et seq., Code 1907; 31 South. 287; *Bottom v. Breuer*, 54 Ala. 290; *McCullough v. Cunningham*, 96 Ala. 584. The petition was deficient.—Section 3890, Code 1907; *Lamar v. Comm. Ct.*, 21 Ala. 776. The proceedings, therefore, are not merely voidable but absolutely void and subject to collateral attack.—Authorities supra, and *Cox v. Johnson*, 80 Ala. 24; *Wyatt v. Rambo*, 29 Ala. 570; *Comm. v. Thompson*, 18 Ala. 696; *Wilson v. Judge*, 18 Ala. 160. Jurisdictional facts cannot be presumed.—*Whitlow v. Echols*, 78 Ala. 209. On these authorities the report of the jury was void and could be given no effect. Leath was entitled to notice of any action to substitute the order, and to have combated the substitution.—*McLendon v. Jones*, 8 Ala. 298; *Adkinson v.*

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Keel, 25 Ala. 553; *Dabney v. Mitchell*, 55 Ala. 495. Hence, the decree was a nullity.—*Hudson v. Hudson*, 20 Ala. 364; *Hall v. Hudson*, 20 Ala. 286; *Herring v. Cheney*, 75 Ala. 378. Petition was addressed to the judge of probate instead of to the probate court in direct contravention of section 3889, Code 1907.—*Folmar's case*, 68 Ala. 120; *Ashford v. Watkins*, 70 Ala. 161. The tenant disclaimed possession and suggested the landlord, and she certainly had no title because she had conveyed it to the tenant.—*McLendon v. Mtg. Co.*, 122 Ala. 389; *Stevenson v. Reeves*, 92 Ala. 583.

HUGH REID, and J. FOUCHE MATTHEWS, for appellee. Not guilty is the only proper plea in ejectment, and as this was filed and trial was thereon, the action of the court on the demurrers to the special pleas and on the motions to strike were immaterial, and will not be reviewed.—*Webb v. Reynolds*, 139 Ala. 398; *Woodstock I. Co. v. Stockdale*, 143 Ala. 550. Error does not affirmatively appear to have been occasioned thereby.—*Reynolds v. Lawrence*, 147 Ala. 216; *Montgomery v. Mason*, 133 Ala. 508; *C. & W. R. R. Co. v. Bridges*, 86 Ala. 448. No recovery was sought under the easement, and this was equivalent to striking the averment.—*So. Ry. Co. v. Bunt*, 131 Ala. 591; *Cross v. Enslinger*, 133 Ala. 409. The defendants were entitled to a judgment under the general issue on the evidence.—*Etowah M. Co. v. Carlisle*, 127 Ala. 668; *Price v. Cooper*, 123 Ala. 392; *Stevenson v. Reeves*, 92 Ala. 582; *Guilmartin v. Wood*, 76 Ala. 204. The suggestion by a tenant does not make the landlord the sole party, and hence, the tenant remained a party.—*McLendon v. Mtg. Co.*, 122 Ala. 389; *Morris v. Beebe*, 54 Ala. 300. The record of the condemnation proceedings import absolute verity and cannot be contradicted or disproved in a collateral proceed-

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ing by extrinsic or parol evidence.—*Perry v. King*, 117 Ala. 533; *Whitlow v. Echols*, 78 Ala. 206; *Martin v. Hall*, 70 Ala. 421; *King v. Martin*, 67 Ala. 177; *Deslonde v. Darrington*, 29 Ala. 92; 17 Cyc. 571; 23 Cyc. 1051 and 1086. The petition contained sufficient jurisdictional facts to give the court jurisdiction and hence was sufficient on collateral attack although it may not have been good against demurrer, and although reversible irregularities may have appeared in the record.—Sec. 3888, Code 1907; *Gamble v. Jordan*, 54 Ala. 432; *Driggers v. Cassidy*, 71 Ala. 529; *Friedman v. Shamblin*, 117 Ala. 454. The entry of the judgment did not render it void.—*L. & N. v. Perkins*, 152 Ala. 133. The ministerial act of entry may be made after the expiration of the term of the judge.—23 Cyc. 839; *Hamil v. Gibson*, 61 Ala. 261.

SIMPSON, J.—This is a statutory action of ejectment, by the appellant, for the recovery of one acre of land described in the pleading. Other lands and interests were originally mentioned, but were eliminated by disclaimer, and while the defendant set up an easement, that was abandoned, and the verdict was for the defendant for the one acre of land only, and that alone, will be considered.

It is unnecessary to consider the action of the court on motion to strike and on demurrers to special pleas, as this court has frequently decided that, besides a plea since last continuance, the plea of "not guilty" is the only proper plea in an action of ejectment; and this case was tried and the verdict rendered on that plea.—*Vadeboncoeur v. Hannon*, 159 Ala. 617, 49 South. 292; *Edinburgh-American Land Mortgage Co. v. Canterbury*, 169 Ala. 444, 53 South. 823; *Etowah Mining Co. v. Doe*

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ex dem. Carlisle, 127 Ala. 668, 669, 29 South. 7; *Webb et al. v. Reynolds*, 139 Ala. 398, 36 South. 15.

The defendant set up title to the one acre of land under certain proceedings in the probate court in 1904, for the condemnation of said one acre for the purpose of enabling him to build a dam, for a public gristmill on the opposite bank of the Chattooga river.

In this collateral proceeding it does not affect the validity of the condemnation proceedings that the petition for condemnation was addressed to the judge of probate, in place of to the probate court, as required by section 3889 of the Code of 1907.

The petition prays that "a writ issue from your honorable court of probate," etc., that "summons may issue from your honor's court of probate," etc., requiring the inquest to be returned to "your honor's court of probate," showing that the proceeding was in the probate court.

Nor is it material that the petition does not mention the age and the residence of Leath, the party who owned the one acre of land on the opposite side of the river, as it prays that summons be served on him; the further proceeding shows that summons was served on him, his own testimony shows that he was over 21 years of age, and the final decree shows that the amount of condemnation money was paid.

It is true that, in proceedings of this kind, the petition must state the jurisdictional facts, and when that is the case, the court acquires jurisdiction, but there are many defects which would be fatal on demurrer, or some direct proceeding, yet are not fatal in a collateral proceeding, in which the presumption of regularity is reversed.—2 Mayf. Dig. p. 946, § 205; Id. p. 947, § 220.

The act of 1822 (Laws 1822, p. 56) requiring petitions for sale of real estate to state the names of the

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heirs, and "which are of age, which are infants or feme covert," yet, in a case where the petition failed to state which of the heirs were of full age, this court held that to be a mere irregularity and not jurisdictional.—*Field's Heirs v. Goldsby*, 28 Ala. 218, 221, 222, 224, 225, 65 Am. Dec. 341.

Under the Code of 1852, § 1755, where the petitioner merely expressed his opinion, in place of stating the facts as required by the statute, and gave a description of the land which would have been held bad as a matter of pleading, this court held that on collateral attack the defects were immaterial, and (speaking through BRICKELL, J.) said: "As a matter of pleading these averments are wholly insufficient. * * * If the sufficiency of the petition had been put in issue by demurrer, or assailed on error, judgment against it must have been pronounced. Then, as has been said by this court, all intendments would have been indulged against the pleader. When the proceedings ripen into a decree, and are collaterally assailed, and rights of property have attached, the rule is changed, and every reasonable intendment is made in favor of the validity of the decree." Also, that "an amendable defect of this character, we cannot believe, will ever justify a sentence of nullity against judicial proceedings, when collaterally assailed."—*Wright's Heirs v. Ware*, 50 Ala. 549, 557, 559.

In a later case, where the allegations of the petition were not in the exact language of the statute, this court (speaking through MANNING, J.) said: "Public policy requires that all reasonable presumptions should be made in support of such sales," and, "if a different rule prevailed, purchasers would be timid and estates consequently be sold at diminished value." And further, after stating the rule as to presumptions, "we should

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understand the petition as it is reasonable to infer that the party who made it and the judge who acted upon it did understand it, and not as they were found to understand it," and then quoted from *Wright's Case, supra.* *Bibb v. Bishop's Home*, 61 Ala. 326, 330, 331.

These cases are quoted in a subsequent case, where the petition alleged merely that C. and N. owned the "remaining undivided one-half interest" in the land, without stating what part each owned, and it is stated that though the petition would have been insufficient on demurrer, yet on collateral attack it is otherwise.—*Whitlow v. Echols*, 78 Ala. 206.

In a case where the petition failed to state the *residences* of the persons interested in the property, this court said that "this would, no doubt, be a good ground of demurrer to the petition, and reversible error, on direct assailement by appeal. Perhaps it might be regarded as jurisdictional if there was no appearance of the defendants in the court below, but this we do not positively decide," and held that the defect was not available on collateral attack.—*Morgan v. Farned*, 83 Ala. 367, 369-370, 3 South. 798.

In the case now under consideration, the parties and the court evidently understood the failure to state whether Leath was a minor (as every one would), to mean that he was over twenty-one, and the evidence shows that he was. They also understood the request to have the citation served on him to mean that he was in the county, and it was in fact served on him, according to the record, and the decree shows that the condemnation money was paid.

Under these facts, it would seem to be the merest quibbling on words to hold that the court did not acquire jurisdiction in this case because the age and residence were not stated in the petition.

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The next insistence of the appellant is that the court should have received parol testimony to the effect that the proceedings were had in the probate court during the incumbency of Judge Appleton, that he rendered the final decree in writing, and as it was misplaced, wrote the decree on the record, after the termination of his term of office. The record shows that the decree was rendered and entered within the time prescribed by law, and on a date during the term of Judge Appleton.

It is one of the principles of our law that the records of our courts must import absolute verity and cannot be contradicted by parol proof.—23 Cyc. 855; 1 Black on Judgments (2d Ed.) § 245, p. 364; Ib. § 246, p. 368; Id. § 276, pp. 421-423; Id. § 287, p. 439. See 2 Black on Judgments (2d Ed.) § 522, p. 786; *Deslonde & James v. Darrington's Heirs*, 29 Ala. 93, 96; *Whitelow v. Echols*, 78 Ala. 210; *Wilkinson et al. v. Lehman-Durr Co.*, 150 Ala. 464-468, 43 South. 857, 124 Am. St. Rep. 75; *Logan v. Central I. & C. Co.*, 139 Ala. 548, 555, 36 South. 729; *Ferguson v. Kumler*, 25 Minn. 184, 187; *Walker v. Armour*, 22 Ill. 658, 660; *Cofer v. State*, 168 Ala. 171, 52 South. 934.

In this collateral proceeding the judgment must stand, as it appears upon the record.

The appellant insists, however, that the face of the proceedings show that they are void because the petition is to *establish* a dam, and it is shown that there was already a dam there, and the proceedings should have been to *raise* a dam.

The authority for proceedings to raise a dam applies only where the previous dam has been “erected under this article” (Code 1907, § 3904), and this court has held that a petition to raise a dam is fatally defective

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unless it shows that the first dam had been erected under the order of the court.—*Bottoms & Powell v. Brewer & Brown*, 54 Ala. 288.

It necessarily follows then that if a man has commenced the erection of a dam without authority of law, his only remedy is to proceed as though he had no dam (which in law is the fact) and submit to the court the entire matter of the building of the dam.

Appellant also insists that the tenant could not defend under the title of the landlord because said tenant ceased to be a party to the proceeding, when he suggested the landlord, and she, the landlady, could not defend, because, during the pendency of the suit, she had conveyed the premises to said tenant.

Such is not the effect of the statute. Under sections 3840 and 3844, the landlord simply becomes a party, and not the sole party to the suit. The tenant also remains a party. This court has held that the tenant cannot have the landlord made the sole party.—*McClendon et al. v. Equitable Mortgage Co.*, 122 Ala. 384, 25 South. 30.

The judgment of the court is affirmed.

Affirmed. All the Justices concur, except DOWDELL, C. J., not sitting.

Bell, et al. v. Leggett, et al.

Ejectment.

(Decided February 6, 1912. 57 South. 836.)

Mortgages; Validity; Description.—Though the first call of the description of land mortgaged be uncertain and ambiguous, yet where the other calls are definite under which the land can be located, the latter will govern, and the mortgage will not be invalid for ambiguity.

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APPEAL from Calhoun Circuit Court.

Heard before Hon. HUGH D. MERRILL.

Ejectment by Julia A. Bell and others against A. D. Leggett and others. Judgment for defendants and plaintiffs appeal. Affirmed.

O. M. ALEXANDER, for appellant. There was a patent ambiguity in the description of the land in controversy in the foreclosure proceedings in the deed from the clerk to Hewitt, and from Hewitt to Greer, in such a sense as to render the foreclosure void and to make the last holder possessed as trustee of an unforeclosed mortgage, for the mortgagor and his heirs, and such possession cannot be adverse to the mortgagor and his heirs.—*Stevenson v. Harris*, 31 South. 445; *Duvall v. McClusky*, 1 Ala. 728; *Bradford v. Steed*, 56 South. 532; *Brannen v. Henry*, 39 South. 93; *Webb v. Elyton L. Co.*, 105 Ala. 471; *Barron v. Barron*, 122 Ala. 194; *Chambers v. Ringstaff*, 69 Ala. 140; *Keith v. McLaughlin*, 21 South. 483; *Lovelace v. Hutchinson*, 17 South. 625; *Roulhac v. Jones*, 78 Ala. 398.

WILLETT & WILLETT, for appellee. The bill of exceptions does not purport to set out all the evidence, and the court will presume there was evidence justifying the giving of the affirmative charge.—*Sherrill v. L. & N. R. R. Co.*, 148 Ala. 1. The ambiguity, if any existed, was latent and could be aided by parol evidence to make it certain.—*Hereford v. Hereford*, 131 Ala. 573; *Donahue v. Johnson*, 120 Ala. 438; s. c. 113 Ala. 126; *Gilmartin v. Wood*, 76 Ala. 204; *Chambers v. Ringstaff*, 69 Ala. 140; *Foster v. Carlisle*, 159 Ala. 621. Monuments, natural or artificial, control courses and distances in the description of land.—*Crampton v. Prince*, 83 Ala. 250. This case presents an imperfect descrip-

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tion which may be rendered certain by parol evidence.—*Dorgan v. Weeks*, 86 Ala. 329; *Black v. Pratt C. & C. Co.*, 85 Ala. 504; *Gaston v. Weir*, 84 Ala. 193; *Myer v. Mitchell*, 75 Ala. 475. When a statute begins to run an intervening disability does not suspend it.—Sec. 4860, Code 1907; *Barker v. Barclift*, 76 Ala. 414; *Barclay v. Smith*, 66 Ala. 230.

SAYRE, J.—Action of statutory ejectment by appellants against appellees. Plaintiffs claimed as heirs at law of one Bell. Defendants claimed under a mortgage deed of trust from Bell to one Hughes, foreclosure by bill in equity with due process, and mesne conveyance from the purchaser. In the mortgage the land in controversy was described as follows: Beginning 80 rods west of the south of the southeast corner of section 7, township 16, range 9, in about one rod north of Oxford road in section 18, running north within 173 rods of north line of section 7; thence west within 49 rods of west line of said section; thence south to one rod of mill ditch; thence east one rod from said ditch to where fence crosses same; thence with the meanderings of said fence to the corner east; thence east to the beginning corner near the road—making 180 acres more or less. A copy of the mortgage deed of trust was made an exhibit to the bill for foreclosure, but in the body of the bill the land was described as “beginning eighty rods west of south of the southwest corner of section seven, township sixteen, range nine, in about one rod north of Oxford road in section eighteen, running north,” and so on. In the subsequent proceedings in the equity court, including the decree of foreclosure, deed to the purchaser, writ of possession, and in the purchaser’s deed to the defendants, the descriptions followed that in the body of the bill. The description of the

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land sued for in the complaint followed that in the mortgage deed of trust. The argument for appellants is that "there was a patent ambiguity in the descriptions of the lands in controversy, that said descriptions are uncertain and vague, and that the foreclosure was void." This argument is elaborated, of course, and thought to be sustained by the citation of authorities; but to no effect. The description found in the court proceedings and in later deeds is not only ambiguous; it is impossible. There is in section 18 no point 80 rods or any other distance west, or south, or southwest, of the southwest corner of section 7. There may be also innumerable points about one rod north of the Oxford road in section 18 and in other sections. And, since there is no authority for singling out any one term in the description of the starting point and locating the error there rather than elsewhere, it must be conceded that the location of the starting point, within itself considered, is defective, obscure, and insensible. But that is not necessarily fatal to the description. The other calls of these several muniments make it clear what the mistake is, and put the description, properly considered as a whole, into harmony with that of the mortgage deed of trust and the complaint. On the authority of *Walsh v. Hill*, 38 Cal. 481, a case closely similar in fact and principle to the case at hand, it is stated in 2 *Delvin on Real Estate* (3d Ed.) that: "When a conflict arises between the starting point and other calls, the starting point, if it is fixed, certain, and notorious, will generally prevail. But if the other calls may as readily be ascertained, and are as little liable to mistake, they are entitled to as much consideration as the first. If they all agree, they control."—Section 1033. This is a reasonable rule of construction, and comports with the other rule which requires that instruments be

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liberally construed for the purpose of giving them some effect. In this case the starting point is not certain; it is ambiguous. However, other calls of the several descriptions in question fix the north line of the property as an east and west line 173 rods south of the north line of section 7. The west boundary is fixed as a north and south line 49 rods east of the west line of the same section. This line runs to a point one rod distant from a mill ditch. Thence, following in part a fence located by the competent testimony of the surveyor, and in other part courses the points of departure of which are fixed by reference to the ditch and the fence, the boundaries are brought to a point 80 rods south of west of the southeast corner of section 7, from which point a north and south line, as called for in the first line of the description, extended to a point 173 rods south of the north line of section 7 incloses an area of approximately 180 acres. Thus the land, notwithstanding the ambiguity of the language used in describing the initial point of departure, is made certain by all other calls conspiring to the same end, and is identified as the land disposed of in the mortgage deed of trust as well as that described in the foreclosure proceeding and subsequent deeds. That proceeding and those deeds were not, therefore, lacking in validity on account of any ambiguity in the descriptions of the property involved and conveyed.

This disposes of the case. The action of the circuit court in giving the general affirmative charge for the defendants was correct, and the judgment will be affirmed.

Affirmed. All the Justices concur except DOWDELL, C. J., not sitting.

[*Mills, et al. v. Hudmon & Co.*]**Mills, et al. v. Hudmon & Co.***Ejectment.*

(Decided February 17, 1912. 57 South. 739.)

1. *Trial; Introduction of Evidence.*—A general objection to the introduction of the record of a mortgage, the original of which had been introduced in evidence, was not sufficient.

2. *Same.*—Where a witness testified that he bought the land in for the plaintiff at the mortgage foreclosure sale, the evidence was competent and the objection that it was in writing or else void was inapt.

3. *Appeal and Error; Harmless Error; Evidence.*—It was harmless error to permit the introduction in evidence of the record of a mortgage where it was an exact duplicate of the original which was also in evidence.

4. *Frauds; Statute of; Written Authority.*—Even though the principal be a corporation written authority is not necessary to enable an agent to bid in land for the principal at a mortgage foreclosure sale.

5. *Mortgage; Validity of Foreclosure; Materiality; Ejectment.*—A defendant in ejectment having failed to plead payment on the mortgage debt under section 3851, Code 1907, cannot set up the invalidity of the foreclosure sale as an answer to an action of ejectment by the mortgagee who had purchased the land at the foreclosure sale, the validity *vel non* of the foreclosure sale being immaterial.

6. *Same; Payment as Defense.*—Where a defendant in ejectment at the suit of the mortgagee does not plead payment of the mortgage debt, or payments on the mortgage debt is not harmed by the exclusion of evidence of such payments.

7. *Husband and Wife; Suretyship; Mortgage on Wife's Property.*—Where the note was signed by both the husband and the wife, and the wife seeks to defeat the note and mortgage on her land on the ground that the debt was that of the husband alone, and that she executed the same as his surety, she has the burden of proof.

8. *Same.*—When part of the debt secured by the mortgage on the wife's property, was her personal debt or the joint debt of her and her husband, the mortgage would be valid to that extent, though void to the extent that the debt was exclusively that of the husband and the wife was only a surety.

APPEAL from Chambers Circuit Court.**Heard before Hon. S. L. BREWER.**

[*Mills, et al. v. Hudmon & Co.*]

Ejectment by Hudmon & Company against A. B. Mills & Company. Judgment for plaintiffs and defendants appeal. Affirmed.

STROTHER, HINES & FULLER, for appellant. The wife cannot become the surety of the husband and a mortgage of her lands to secure the husband's debt is void.—*Richardson v. Stephens*, 114 Ala. 238; *McNeil et al. v. Davis & Sons*, 105 Ala. 657; *Elston v. Comer*, 108 Ala. 76; *Richardson v. Stephens*, 122 Ala. 301; *Clements v. Draper Mathis & Co.*, 108 Ala. 211; *McCrary v. Williams*, 127 Ala. 353; *Henderson v. Brunson*, 141 Ala. 674. The invalidity of such mortgage may be established by extrinsic evidence in any court.—*Richardson v. Stephens*, 122 Ala. 301; *Price v. Cooper*, 123 Ala. 392. J. D. Mills was not incompetent to testify as to the transaction in which the mortgage was executed. To render a person incompetent as to a transaction with a deceased agent, the witness must have a pecuniary interest in the result of the suit.—*Birmingham Co. v. Tenn. Co.*, 127 Ala. 137; *Morris v. Birmingham National Bank*, 93 Ala. 511; *Howle v. Edwards*, 97 Ala. 653; *Garrett v. Trabue Davis & Co.*, 82 Ala. 227, 231. The court committed error in allowing the introduction in evidence of the record of the mortgage, against the objection of the defendants. The mortgage itself being in existence was the highest and best evidence and the record was not admissible.—*Burgess v. Blake*, 128 Ala. 105; *Farrow v. N. C. & St. L. Ry.*, 109 Ala. 448; *Foxworth v. Brown*, 114 Ala. 299; *Potts v. Colman*, 86 Ala. 94. The circuit court erred in admitting evidence of the alleged foreclosure of the mortgage against the objection of the defendants. The attempted foreclosure was void, it amounted to no foreclosure at all; there was no writing of any kind evidencing a sale and the

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attempted sale was therefore void under the statute of frauds.—*Nelson v. Shelby Manufacturing and Improvement Co.*, 96 Ala. 515; *Carroll v. Power, Ex'r*, 48 Ala. 298; *Jackson et al. Adm'rs v. Scott et al.*, 67 Ala. 99. What occurred at the time the mortgage was executed, what was said and done at that time, was competent evidence; it was a part of the res gestae, and the court erred in excluding the testimony of Mrs. A. B. Mills as to this transaction.—*Bank v. Webb*, 108 Ala. 132; *L. & N. R. R. Co. v. Landers*, 135 Ala. 511; *LaFayette Ry. Co. v. Tucker*, 124 Ala. 514.

E. M. OLIVER, for appellee. It was not necessary that the authority to the agent to purchase at foreclosure should have been in writing.—*Jackson v. Tribble*, 156 Ala. 480. Appellants cannot complain that this transaction was void under the statute of frauds.—*Cooper v. Hornsby*, 71 Ala. 62; *Welch v. Coley*, 82 Ala. 363. It was not necessary that the attorney making the sale under the mortgage should have had written authority.—Authorities supra; 2 Jones on Mortgages, sec. 1861. The deeds were made to Mrs. A. B. Mills and she accepted the deeds when she executed the mortgage and is therefore estopped to say that the mortgage was not her debt. She cannot retain the fruit and repudiate the contract.—*Kahn v. Peters*, 104 Ala. 523; 16 Cyc. 787. There was no plea of payment and hence, evidence of payment was not admissible. The suit being by the mortgagee against the mortgagor the foreclosure became immaterial.—Authorities supra.

SOMERVILLE, J.—On May 1, 1907, the plaintiff Hudmon & Co. sold to Annie B. Mills 60 acres of land, and executed and delivered to her the deed therefor, for a consideration of \$1,196.28. On the same day Annie B.

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Mills, and her husband, J. D. Mills, who are here sued as codefendants, jointly executed a mortgage to plaintiff conveying said 60 acres of land, another 80-acre tract, and certain sawmill machinery and appurtenances. The mortgage recites that it is given to secure the payment of the mortgagors' two certain promissory notes of even date for \$918.67 each, payable one in January, 1908, and one in January, 1909. It further stipulates that the mortgage is given for the purchase money of the land and machinery described. It recites also the existence of a previous indebtedness of \$369.34, due by the note of said Annie B. and J. D. Mills made March 9, 1904, and payable April 1, 1907, which is included in, but not discharged by, the two notes of May 1, 1909. It does not directly appear what the small note was given for, but as plaintiff had sold the 80-acre tract of land to Mrs. Mills on March 8, 1907, for \$888.69, it may be inferred that it was for part of the purchase money for that land. Nothing was ever paid on this mortgage debt, and the mortgage was foreclosed under the power on October 5, 1908, and bought in for the plaintiff by its agent; but no deed was executed to the purchaser, nor was any written memorial made of the sale. The plaintiff, who was the mortgagee and purchaser at said foreclosure sale, sued the defendants, the mortgagors, in ejectment, for the possession of the two tracts of land referred to, and the trial was had on the general issue, without plea or suggestion of payment of, or payments on, the mortgage debt. The court instructed the jury to find for the plaintiff, and there was verdict and judgment accordingly. The giving of this instruction, as well as numerous rulings on the evidence, are assigned as error. The theory of the appellant is that the debt for which the mortgage was given was not the debt of Mrs. Mills, but of her husband; and

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that, as the land belonged to her, the mortgage was entirely void as an attempt to secure the husband's debt.

After the plaintiff had introduced the original mortgage in evidence, it was allowed against defendant's general objection to introduce also the record of the mortgage. If it was improperly admitted, still a general objection was not sufficient to exclude it; and it was in any case harmless to defendants, as the record is an exact duplicate of the original.

Plaintiff's attorney, who superintended the foreclosure sale, testified that he bought the land in for plaintiff. Defendants objected to the statement on the ground that it was in writing, or else void. The answer was competent, and the objection itself was inapt. And, as written authority was not necessary to enable the agent to bid in the land for his principal, the question to this witness as to his authority, whether written or not, was properly excluded. Nor was this made necessary by the fact that the principal was a corporation.

However, as there was no plea of partial payment, under section 3851 of the Code, the validity vel non of the foreclosure is not material to the determination of the issue.—*Jackson v. Tribble*, 156 Ala. 480, 47 South. 310. And all the rulings of the trial court to the exclusion of evidence of payments on the mortgage debt were for that reason without error.

The real question, therefore, is simply whether the debt evidenced by the two notes of May 1, 1907, or any portion of it, was the debt of Mrs. Mills. It conclusively appears that the debt for which the mortgage was given included at least the purchase money for the 60-acre tract, \$1,196.28, not only from attendant circumstances, but from the express agreement found in the mortgage itself. Nor is there a word of testimony to

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the contrary. Mrs. Mills herself does not attempt to deny it. True, Mr. Mills testified that the mortgage "was given for an engine and boiler," with respect to which he also stated it was his debt; the latter statement being ruled out by the court against defendants' exception. But these facts were no more than what was shown by the mortgage itself, and in no way contradictory of it. For he *was* plainly bound for the whole debt as well as for its constituent parts; and this did not render the debt, at least as to other portions of it, any less the joint or personal debt also of Mrs. Mills.

The burden of proof is on the wife to show that a debt evidenced by the note and mortgage signed by her and her husband was that of the husband merely, and that she executed them only as surety.—*Gibson v. Wallace*, 147 Ala. 322, 41 South. 960; *Sample v. Greyer*, 143 Ala. 613, 42 South. 106; *Mohr v. Griffin*, 137 Ala. 456, 34 South. 378; *Lunsford v. Harrison*, 131 Ala. 263, 31 South. 24. If the mortgage security was given for a joint debt, as to which the wife was an actual coprincipal, the inhibition of the statute does not apply.—*Lunsford v. Harrison, supra*. Nor does it apply if *any part* of the debt secured was an original personal obligation of the wife; for, as observed by WEAKLEY, C. J., in *Gibson v. Wallace, supra*, "the question at last is whether, notwithstanding the form of the transaction, the wife was attempting to secure a debt *entirely* her husband's, upon which she was not bound either separately or jointly." And again, it was said by COLEMAN, J., in *Clements v. Draper Mathis & Co.*, 108 Ala. 211, 214 19 South. 25, 27, in defining the scope of the statute. "The material question is whether the debt secured by the mortgage sought to be foreclosed, or *any part of it*, was the debt of the wife." Of course, if any distinct por-

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tion of the debt was exclusively the husband's, the wife's security obligation would be null and void to that extent, but no further.

In our view of the case the plaintiff was entitled to the general affirmative charge, without regard to the testimony excluded or admitted against defendants' objection. The judgment must therefore be affirmed.

Affirmed. All the Justices concur.

Brannan *v.* Henry.

Ejectment.

(Decided January 18, 1912. 57 South. 967.)

1. *Public Lands; Statutes; Constitutionality.*—Acts 1878-9, p. 198, to regulate sales of swamp and overflow lands and validating purported sales thereof is constitutional.

2. *Statutes; Title.*—The provision giving a *prima facie* evidential effect to documents found in Acts 1911, p. 192, does not render the act violative of section 45, Constitution 1901.

3. *Same; Retrospective Laws.*—Acts 1911, p. 192, is not, in its application to cases arising prior to its passing violative of section 95, Constitution 1901; while *ex post facto* laws are prohibited, the rule is otherwise as to changes in the rules of evidence which pertain only to the remedy and not to the right.

4. *Same; Power of Legislature; Curative Acts.*—The legislature has the power to pass curative acts giving effect to defective conveyances of public lands.

5. *Evidence; Ancient Documents.*—When coming from the proper custody, an ancient document is self-proving and admissible without evidence of its authenticity.

6. *Same; Judicial Notice.*—The court will take judicial notice that there are two tracts of land in Mobile county which answer to the description "N. E. $\frac{1}{4}$ of section 36, township 2, range 4."

7. *Adverse Possession; Color of Title; Ambiguous Deed.*—Where one holds land adversely, claiming under a paper title which indifferently describes the land claimed or other land, the deed is admissible to show color of title, whether the ambiguity is patent or latent, for possession thereunder should put the true owner on inquiry.

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8. *Same; Hostility; Evidence.*—In connection with visible acts of ownership done on the premises, the payment of taxes upon land is evidential for the purpose of showing ownership and the extent of possession.

9. *Same.*—Since the substantive fact of payment, and not the proof of receipts, is the matter sought to be shown in evidence, one holding land adversely may prove payment of taxes without producing the receipts.

10. *Same.*—Payment of taxes on land is only evidence tending, in connection with other matters, to show adverse possession, and cannot alone establish the adverse holding.

11. *Same; Evidence.*—The evidence examined and held insufficient to show defendant's prescriptive title by adverse possession.

12. *Same; Color of Title; Effect.*—Color of title in itself is not evidence of adverse possession, but it requires evidence of visible acts of ownership, and can only draw and impart to the whole tract the same claim and character of possession which is impressed on that actually possessed.

13. *Appeal and Error; Harmless Error; Evidence.*—Where the evidence of adverse possession was insufficient to establish a defendant's right to any part of the land, the improper exclusion of a deed offered by him to show his color of title was harmless.

(Anderson and McClellan, JJ., dissent.)

APPEAL from Mobile Circuit Court.

Heard before Hon. SAMUEL B. BROWNE.

Ejectment by Mary Henry against L. I. Brannan.
Judgment for plaintiff and defendant appeals. Affirmed.

See also 142 Ala. 698; 39 South. 92; 110 Am. St. Rep. 55.

RICH & HAMILTON, for appellant. The Act of April 4, 1911, is unconstitutional, because violative of section 45 of the Constitution of 1901, as well as section 95, Constitution 1901.—*M. J. & K. C. v. Turnipseed*, 219 U. S. 35. The Act of February, 1879 was also unconstitutional.—*Mobile D. D. Co. v. Mobile*, 146 Ala. 198; *Favors v. Glass*, 22 Ala. 621. The contrary has been held in *McClure Lumber Co. v. Jordan*, 54 South. 415, but it is respectfully submitted that that case should be overruled. The so-called patent should have

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been excluded from evidence.—*So. Ry. Co. v. Cleveland*, 53 South. 767. The act of April 4, 1911, is not shown to apply to the patent in this case, and even if it were valid would not avail the plaintiff.—*Crawford v. The State*, 57 N. E. 931; *Ward v. Henry*, 59 Wis. 76; *Greenl. Evid.* sec. 62. The court erred in excluding the tax deeds as color of title in the defendant.—*Pugh v. Youngblood*, 69 Ala. 296; *Hughes v. Anderson*, 79 Ala. 209; *Stovall v. Fowler*, 72 Ala. 77; 90 Ala. 275; 108 Ala. 635; 91 Ala. 533. The description contained a latent ambiguity which could be explained by parol evidence.—*Bullock v. Malone*, Minor 400; *Pearson v. Adams*, 29 South. 977; *Moody v. A. G. S.*, 124 Ala. 195; *Stumphill v. Bullen*, 121 Ala. 250; *Barron v. Barron*, 122 Ala. 194; *Chambers v. Ringstaff*, 69 Ala. 140. The second tax deed related back and became as of the date of the first deed.—20 A. & E. Enc. of Law, 737, 2 Dev. on Deeds, 731-2; *Hawkins v. Pearson*, 96 Ala. 359. Brown paid for the land and went into possession under a deed, and the statute requiring filing of notice does not apply.—*Brannan v. Henry*, 142 Ala. 703. Counsel discuss charges given and refused but without further citation of authority.

ERVIN & MCALLEER, for appellee. The acts are not unconstitutional as failing to express in the title the substance of their provisions.—*State v. Crook*, 126 Ala. 100; *Montgomery v. Birdsong*, 126 Ala. 632; *Shepherd v. Dowling*, 127 Ala. 1; *A. G. S. v. Reid*, 124 Ala. 253; *Montgomery v. Robinson*, 69 Ala. 413; *Ex parte Pollard*, 40 Ala. 99. The acts cannot be said to contain two subject matters as everything therein is cognate to the main purposes.—*Mitchell v. The State*, 134 Ala. 392; *Ex parte Mayor of Birmingham*, 116 Ala. 186; *Jackson v. The State*, 136 Ala. Unconstitutionality

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must appear beyond reasonable doubt.—*Meyer v. Green*, 46 South. 270. The patent was an ancient document and proved itself.—*Jordan v. McClure L. Co.*, 54 South. 422; 8 A. & E. Enc. of Law, 729. The case of *So. Ry. Co. v. Cleveland*, relied on by appellant was decided prior to the passage of the acts of 1911. The patent was an ancient document, and being produced from the proper source proves its recitals as to the authority of the secretary.—3 Wig. sec. 2144. The defect in the first deed was patent.—*Chambers v. Ringstaff*, 69 Ala. 143; *Vann v. Lunsford*, 91 Ala. 580. A deed does not relate back so as to affect strangers to the conveyance.—*Chapman v. Fields*, 70 Ala. 404; *L. & N. v. Boykin*, 76 Ala. 560; *Dickerson v. Carroll*, 76 Ala. 380; *Reddick v. Long*, 124 Ala. 264; *Henry v. Frohlichstein*, 149 Ala. 337; *Johnson v. Donahue*, 124 Ala. 45. The evidence was insufficient to establish defendant's title by adverse possession.—*Chastang v. Chastang*, 141 Ala. 460; *Adler v. Prestwood*, 22 Ala. 373; *Robinson v. Allison*, 124 Ala. 329, and authorities supra. Counsel discuss the charges given and refused and insist that on the authorities above set out there was no error committed therein.

SAYRE, J.—In this case the appellee recovered judgment against the appellant in statutory ejectment for a quarter section of what was proved to have been swamp and overflowed lands conveyed by the government of the United States to the state of Alabama. Plaintiff claimed under the state. The defendant relied upon title acquired by an adverse possession for 10 years. Plaintiff put in evidence a patent purporting to have been issued by the state on January 2, 1872, to Thomas Henry, who is described therein as assignee of W. D. Mann, and a certified copy of the probated will of

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Thomas Henry devising to her the land described in the declaration. On the theory perhaps that they were private acts, plaintiff also offered in evidence the act of February 12, 1879, entitled, "An act to further regulate the securing, preservation and sales of the swamp and overflowed lands of the state" (Acts 1878-79, p. 198), and the act of April 4, 1911, entitled, "An act to authorize the introduction in evidence of documents executed prior to February 12, 1879, by the Governor in person or in his name by his secretary, purporting to convey any of the state's lands, but ineffective as conveyances, and certified copies of the record of any such documents which have been recorded for as much as twenty years, and to prescribe the probative effect of such documents and copies."—Gen. Acts 1911, p. 192. Appellant holds that both these acts are unconstitutional, void, and of no avail to plaintiff, the effect of whose patent depended upon these statutes, the first confirming prior sales of swamp and overflowed lands where the purchase money had been paid to persons acting, or professing to act, for the state, the second giving evidential effect to patents defectively executed, and which recite either the payment of the purchase money or the deposit of a receipt or certificate of the officer authorized to receive the money acknowledging that payment had been made.

The act of 1879 had full discussion by able counsel in *Jordan v. McClure Lumber Company*, 170 Ala. 289, 54 South. 415, was carefully considered by the entire court, and was held to be free of constitutional objections such as are now urged against it. We do not see that any good purpose could be served by reopening the discussion.

Several faults are found in the act of 1911 as applicable to this case. For one, it is said that the title of

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the act gives no warning of that provision which gives a *prima facie* evidential effect to documents which recite the deposit of a receipt or certificate of the officer authorized to receive the money acknowledging that such payment had been made, as is the case in the patent put in evidence by the plaintiff. The argument seems to concede the validity of so much of the statute as gives effect to documents purporting to convey lands of the state and reciting payment of the purchase money; at least, it says nothing to the contrary. But it is said that the recital of a receipt or certificate of payment is nothing more than the recital of a recital. True; but we are unable to approve the inference drawn by appellant. If the title of the act had undertaken to catalogue those considerations which conveyances to be affected should recite, had particularly provided for the case of conveyances reciting payment, and had omitted mention of the case of those reciting mere receipts or certificates, the argument would hold. But that is not the nature of the title. It is comprehensively broad, and foreshadows an act dealing with documents purporting to convey any lands of the state without regard to the character of the recital of consideration to be found in such documents, without regard indeed to whether there is any recital of the sort. Section 45 of the Constitution 1901, to which the appellant here refers, has been much discussed, and is well understood. Mere generality of title does not invalidate a statute, so long as it fairly and reasonably expresses the subject-matter of the act, and is not made a cover for legislation incongruous in itself.—*Toole v. State*, 170 Ala. 41, 54 South. 195; *State v. Street*, 117 Ala. 203, 23 South. 807. In this case the title of the act is not unreasonably broad. It does fairly cover the provision to which the appellant objects, and contains no misleading

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catalogue. The act, as for anything appearing so far, is valid.

The last cited case of *State v. Street*, sufficiently demonstrates the defect in appellant's argument that the act contains two subject-matters because it provides, not only for the probative effect of the original document, but provides for the introduction in evidence of certified copies where the original had been recorded for as much as twenty years. No reason why the Legislature might not in one act dispose of the subject of the patents it had in mind by giving effect to them as muniments of title and providing means of proving them can bulk large enough to require extended notice. The proposition contended for in the argument would seriously embarrass legislation by requiring laws to be narrowly and excessively restrictive in scope and operation, and by the multiplication of their number, without avoiding or suppressing any mischief against which the constitutional provision is directed.

But this suit was brought some four or five years before the passage of the act of 1911, and on this fact appellant bases a contention that it is unconstitutional in its application to this case. A clause of section 95 of the Constitution provides that: "After suit has been commenced on any cause of action, the Legislature shall have no power to take away such cause of action, or destroy any existing defense to such suit." Retrospective legislation dealing with the laws of evidence in criminal prosecutions and rendering a conviction more easy than it would have been at the time when the offense was committed is *ex post facto* and prohibited; but "the rule is otherwise as to changes in the rule of evidence in civil cases. These pertain to the remedy, and form no part of the obligation of an existing contract. It is a plain proposition, free from all

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doubt, that no one possesses a vested right to existing rules of evidence, in civil causes of action, and the law-making power is at liberty to change them, from time to time, within the broad latitude of their sound discretion.”—*Goodlett v. Kelly*, 74 Ala. 213; *State v. Thomas*, 144 Ala. 77, 40 South. 271; 2 L. R. A. (N. S.) 1011, 113 Am. St. Rep. 17, 6 Ann. Cas. 744. And the general principle is that statutory alterations in rules and methods of procedure, including rules of evidence, are always retrospective unless there be some good reason against it.—Endlich, Interp. Stat. §§ 282, 286. “Statutes which relate alone to the remedy, without creating, enlarging, or destroying the right, operate generally on existing causes of action, as well as those which afterwards accrue.”—*Coosa River Co. v. Barclay*, 30 Ala. 120; *Tutwiler v. Tuskaloosa Co.*, 89 Ala. 391, 7 South. 398; *Birmingham Trust & Savings Co. v. Currey, Infra*, 57 South. 962. The act of 1911 in form provides a rule of evidence. By the act of 1879 the patent of 1872 became in effect a transfer of the state’s original and undisputed title upon condition that the purchase money had been paid, and, under the act of 1911, it became in effect a deed subject to be defeated by proof that the purchase money had not been paid. Both statutes are curative in form and in effect. Curative statutes are by their very nature intended to act upon past transactions, and are therefore wholly retrospective. Their effect, in the absence of an express provision to the contrary, and saving the vested rights of innocent third parties, is to make the acts to which they relate valid ab initio. The power to cure past transactions defectively executed is a beneficent power. The last clause of section 95 of the Constitution does not abrogate the power of the Legislature to act in that way. It preserves the rights of the parties to pending

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causes as they existed under the law at the time of the passage of an act, but puts no restraint upon the power of the Legislature in respect to the regulation of the manner in which those rights may be proved, except that it must not, under the guise of regulating the presentation of evidence, contrive in pending suits to take away a cause of action or destroy any existing defense. The act of 1911 has no inhibited effect. It cannot operate to impair any right defendant then had or may have since acquired. As to causes of action and rights of defense it leaves parties just where they were, but arms them, whether plaintiffs or defendants with means of proving a fact about which, in view of the state's repeated recognition of it, there ought now to be no doubt. It leaves the defendant as free as he ever was to prove any title he may have acquired at any time or in any way. To take cognizance of the difficulties in making proof which, as it happens in this case, the statute shifts from the plaintiff to the defendant—proof which, it may be noted, does not affect defendant's title, though it does go to plaintiff's title in its bare legal aspect—for the purpose of destroying the statute, would be to deny the right of the Legislature to pass laws affecting the rules of evidence. That power has been too often conceded by the courts to be now denied, and doubtless the difficulty of proving facts has in the great majority of cases furnished the reason why such acts have been passed. So, then, conceded for the argument that at the time of the passage of the act of 1911 the defendant by virtue of section 95 of the Constitution had a vested right in that rule of law which permitted him to defeat plaintiff's action by showing an outstanding title in the state, and thereby conceding also that the state might not have made its acknowledgment of the receipt of the purchase money for this land conclusive as to all the

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world, instead of *prima facie* only, we conclude that the acts of 1879 and 1911 were not in excess of legislative power, and that the objections to those acts and the plaintiffs patent were properly overruled.

The patent purported to be an ancient document, came from the proper custody, and was free of circumstances casting suspicion upon its genuineness. Under these conditions, it was self-proving, and needed no further evidence of its authenticity (*Jordan v. McLure Lumber Co., supra*), or its date (*Brown v. Nelson*, 164 Ala. 397, 51 South. 360). It was properly admitted in evidence.

Defendant testified that he had, with intermissions—intermissions of which we will speak more in detail hereafter—been in possession of the land in controversy since 1890, and in connection with this testimony he offered in evidence what purported to be a tax deed made to him by Cyrus D. Hogue, auditor, on April 3, 1890, conveying the N. E. $\frac{1}{4}$ of section 36, township 2, range 4, lying and being situated in Mobile county, Ala. The deed was not offered as a muniment of title, but the offer was expressly limited to the purpose of showing color of title. The court sustained plaintiff's objection to this deed, and this ruling was objected to, and is assigned for error. This same question was raised in this case on a former appeal.—142 Ala. 698, 39 South. 92, 110 Am. St. Rep. 55. As then stated, the court judicially knows that there are two tracts of land in Mobile county answering to the description in the auditor's deed. But the court conceding, grudgingly it seems, that this description constituted a patent ambiguity which rendered the conveyance void for uncertainty and unavailable as color of title, as seems to have been held also in the later case of *Henry v. Frolichstein*, 149 Ala. 337, 43 South. 126, found relief from the situation by

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having recourse to a recital of the deed to the effect that the land so described had been advertised and sold in 1881 for taxes due from M. D. Mann, the owner of said land, holding that this reference to the ownership of the land would authorize a resort to competent parol evidence in aid of the description, and that, therefore, the deed should have been admitted for the purpose of showing color of title. The court concluded: "The defendant should, under the rule above declared, have been permitted to show that he purchased the land and paid for it, and that he was claiming under the purchase. This does not mean that the deed would have been admissible in evidence without proof aliunde aiding the description." The court below seems to have understood this to mean that, in order to get the deed before the jury as color of title, it was necessary that there should be some evidence that Mann owned the land. There was no such evidence, and the court excluded the deed. Appellant understands that evidence that he had taken possession under the patent of land answering its description was enough to identify the land and render the patent available for color of title. He relies upon *Barron v. Barron*, 122 Ala. 19, 25 South. 55, and the cases there cited. In that case the conveyance described the land as "the east half of the southwest fourth of section thirteen, township thirteen, range four east," without giving state or county, or saying whether the land lay east of St. Stephens or Huntsville meridian. It was held competent by parol evidence to identify the land, and thus supply the deficiency in description in the mortgage. We think our cases, in connection with the theory underlying the doctrine of color of title, lead to the conclusion that, where one holds land adversely claiming under a paper title which describes indifferently the tract held and another, whether

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the ambiguity be latent or patent, and though the paper title be void for other reasons, possession so held puts the true owner on inquiry which, it must be presumed, will disclose the character and territorial extent of the adverse claim. See *Crowder v. T. C. I. Co.*, 162 Ala. 151, 50 South. 230, 136 Am. St. Rep. 17, and cases there cited.

Defendant should have been allowed to prove payment of taxes from 1890 to the time the suit was brought. Payment of taxes, in connection with visible acts of ownership done upon the premises, is evidence tending to show claim of ownership and extent of possession.—*Baucum v. George*, 65 Ala. 259; *Green v. Jordan*, 83 Ala. 221, 3 South. 513, 3 Am. St. Rep. 711; *Knight v. Hunter*, 155 Ala. 238, 46 South. 235. And this, notwithstanding defendant's failure to produce receipts. The effort was not to prove the contents of receipts that may have been given, but to prove the substantive fact of payment.—2 Wig. Ev. § 1245; *Johnson v. Cunningham*, 1 Ala. 249; *Bank v. Borland*, 5 Ala. 531; *Fletcher v. Riley*, 169 Ala. 433, 33 South. 816.

But the errors indicated did no harm to the defendant. The theory of this court's decision heretofore has been that color of title is not of itself evidence of adverse possession, and that it requires as much evidence of visible acts of ownership exercised on the premises to prove an adverse holding with color as without it. "It can only draw and impart to the whole the same claim and character of possession which is impressed upon the part by actual possession."—*Crowder's Case, supra*. The payment of taxes also is evidential in the way indicated above; but, standing alone, it can avail nothing. Assuming, then, that defendant proved color of title and the payment of taxes, both covering the entire period from 1890 to 1907, when this suit was

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brought, it appears upon an analysis of the evidence that during the interval between 1894, in which year defendant ceased to cut timber from the land, and the small house and the fence around the ox lot which he had built disappeared, and the year 1900 when the trees were boxed for turpentine and cross-ties were cut, plaintiff went upon the land on two occasions only. Upon those occasions he went for timber for axe handles and wagon spokes. At another place defendant testifies that he and his brother cut firewood at times, but hauled nothing from the land. The only other purpose to which the land was put during this interval of six years was that defendant's cattle grazed on it, being turned out at the house, which we take to mean defendant's dwelling in the neighborhood, but not on the land. The neighbors' cattle also grazed there. Sheep were turned into the woods and stayed there, because, as plaintiff states, they would not cross the water, meaning by water a slough which defined the tract on one side. We know that the grazing of cattle on uninclosed land signifies nothing, and that the occasional gathering of firewood amounts to hardly anything more. Nor did the cumulative effect of all the facts warrant the inference of any open, notorious, and hostile possession for any continuous period of 10 years. Whatever may have been the character and effect of the possession shown by the defendant during the period from 1890 to 1894, and however much it may be given in the ordinary case to mere short-lived intermissions in the physical demonstration of the premises of a hostile claim, we are of the opinion in this case that, after according to defendant's evidence the utmost probative force it was entitled to receive under the rules of evidence, the facts shown in respect to the possession of this land during the interval of six years show a serious break in the continuity

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of possession fatal to the appellant's claim of title. There is no dispute about the principles of law obtaining in such cases. They are of familiar and oft-repeated statement. It may be conceded, however, that our cases have shown some diversity of opinion as to their application to the facts of cases as they have arisen. We have considered the evidence in this case in all its bearings, and are of opinion that the facts testified to on behalf of the appellant, whatever they may be held to show in respect of his intention to claim ownership during the period of six years, or thereabouts, they fail to show that continuity of possession without which mere intention amounts to nothing. They show at most only occasional disjointed acts of possession affording in our judgment no sufficient basis for a verdict which would divest the true owner of his title. The trial court might well have given the general affirmative charge for plaintiff, since the burden of proving title by adverse possession was upon the defendant. This conclusion eliminates all questions as to rulings assigned for error, other than those we have noticed, and the judgment will be affirmed.

Affirmed. All the Justices concur except DOWDELL, C. J., not sitting, and ANDERSON and McCLELLAN, J., dissenting.

McCLELLAN, J.—The announcement in the opinion of the court that the conjoint effect of the acts of 1879 and of 1911, upon the patent from the state, was that "it became in effect a deed subject to be defeated by proof that the purchase money had not been paid," was not, as appears from the feature of the opinion treating these acts, intended to affirm that these acts operated upon the instrument or title in any direct, immediate sense, or that they (acts), together or alone, changed the

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condition precedent of the act of 1879 to a condition subsequent in respect of the payment of the purchase money. The sum of this announcement is that the general result wrought by these acts was to impose the perhaps difficult task of refuting the *prima facie* evidence of compliance with the condition of previous payment fixed in the act of 1879, upon him whose asserted right rests for vindication or enforcement upon the non-compliance by the patent holder with the condition of previous payment of the purchase money. Such must, of course, be the meaning of the quoted announcement; for otherwise the ruling, in which the writer concurs, that that act (1911) only established rules of evidence would be necessarily departed from, and thereby leave the decision with inconsistent conclusions pronounced.

The act of 1911, when considered in connection with that of 1879, does not change the burden of proof from where it was under the act of 1879; but, and at most, it aids, arms, the patentee and his successors in right with means to meet his obligation to show *prima facie* that his purchase was within the benefit of the act of 1879.

2. The court below having erred, as this court holds, in excluding the testimony of defendant that he had paid taxes on the land continuously for 21 years, beginning in 1890, and also in excluding the auditor's deed to defendant, as color of title under which defendant entered the possession in 1890—in both of which rulings the writer concurs—the writer is of the opinion that a reversal for these errors should enter. This result cannot, it seems to the writer, be soundly avoided by the further finding that the affirmative charge upon the issue of adverse possession was plaintiff's due. If it would not too greatly lengthen this opinion at this time, I should set out the defendant's testimony, by which, in my judgment, the matter was clearly made a jury ques-

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tion. At a future and more convenient time this testimony will be fully stated, if not its material substance quoted.

In my opinion the judgment should be reversed.

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Ejectment.

(Decided November 16, 1911. Rehearing denied February 15, 1912.
57 South. 767.)

1. *Deeds; Delivery; Necessity.*—Whether the conveyance be upon a valuable consideration or a voluntary conveyance for love and affection, delivery is indispensable to its validity.

2. *Same; Life of Grantor.*—While the delivery of a deed must be in the lifetime of the grantor to make it valid, an inchoate delivery to a third person as a depositary with instructions to deliver to the grantee upon the grantor's death, and a delivery by him, the depositary being a trustee, to the grantee will relate back to the prior delivery for the purpose of passing title.

3. *Same.*—A delivery of a deed subject to recall by the grantor before delivery to the grantee is not effective to pass title.

4. *Same; Question to Jury.*—The question whether a grantor in a deed executed his intention to pass title by a sufficient delivery is one of fact and generally for the jury.

5. *Same; Right to Revoke.*—A right to revoke a delivery of a deed by a grantor to a person other than the grantee or his agent, which will render the delivery ineffectual to pass title need not be expressly reserved; it being sufficient that the grantor's act did not as a matter of law place the deed beyond his control.

6. *Same.*—There is no presumption that a handing of a deed to a person other than the grantee or his agent was with the intention to pass title to the grantee, and, to make such act a delivery, the intention of the grantor must have been expressed in unmistakable manner at the time of execution or subsequently while the deed was in his possession.

7. *Same.*—Merely leaving a deed with the agent or attorney of the grantor is wholly insufficient to show an intention to divest the title and will not constitute a delivery.

8. *Same; Delivery; Establishment.*—The fact that a deed named the wife of the grantor as grantee and embraced all the property of the grantor, was in the handwriting of a resident lawyer and notary public, recited a consideration of love and affection, and

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directed that the wife pay the grantor's just debts, and that upon the same day, the grantor committed suicide, are not circumstances showing acts or declarations of the grantor at the making of the deed, of its delivery, and are not sufficient to show that the grantor delivered a deed to a third person for his wife.

9. *Same.*—The mere handing of a deed to a stranger with a request to keep it, without mentioning what the paper was, or the grantee's name, is not sufficient as a delivery to a grantee therein, although the grantor's wife.

(Dowdell, C. J., Mayfield and Sayre, JJ., dissent.)

APPEAL from Pike Circuit Court.

Heard before Hon. H. A. PEARCE.

Ejectment by L. A. Culver and others, against J. S. Carroll. Judgment for defendants, and plaintiff appeals. Reversed and remanded.

NORMAN & SON, for appellant. Under the evidence in this case the deed was not shown to be so effectually delivered as to pass title to the grantees therein named. The issue in this case had no reference to the value of the property, but merely to its rental value, and hence, the value could not shed any light thereon.—*Moore v. Harvey*, 50 Vt. 297; *Cohoон v. Kienon*, 46 Ohio St. 590. No sufficient predicate was laid for the introduction of public records such as sought to be introduced in this case. A deed must become effective by the delivery during the life of the grantor, or by delivery to a depositary as a trustee for delivery to the grantee on the death of the grantor, and the intention to pass title by such delivery must be clearly expressed.—*Richardson v. Woodstock I. Co.*, 90 Ala. 270; *Griswold v. Griswold*, 148 Ala. 241; *Fitzpatrick v. Brigman*, 130 Ala. 453; *Frisbee v. McCarty*, 1 S. & P. 56; 5 A. & E. Enc. of Law, 448, note 4; 9 Same 155. Under these authorities the evidence was not sufficient to show a delivery of the deed.

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FOSTER, SAMFORD & CARROLL, for appellee. Under the facts in this case the question of delivery was one for the jury.—*McLure v. Colclough*, 17 Ala. 89; *Ellsberry v. Boykin*, 65 Ala. 340; *Fitzpatrick v. Brigman*, 133 Ala. 242; *Napier v. Elliott*, 162 Ala. 129; *Alexander v. Alexander*, 71 Ala. 297. A sufficient predicate was laid for the introduction of the record.—*Huckabee v. Shepherd*, 75 Ala. 342.

SOMERVILLE, J.—The action is one of ejectment brought to recover a tract of land described in a deed executed by L. A. Culver, deceased, to his wife, Julia F. Culver. The conveyance is dated December 22, 1891, is duly signed and acknowledged, and based on a consideration of natural love and affection. The lower court permitted the deed to go to the jury as part of the evidence in the case, to which exception was taken by appellant's counsel, and error is assigned based on this ruling. The question raised for decision is whether the deed was ever delivered to the grantee, Mrs. Culver, during the lifetime of the grantor so as to have become effective. The paper was left by the grantor with the witness Kelsoe and one Sykes, now deceased, before the death of the former, who committed suicide very soon after. All the evidence on the question of delivery was given by Kelsoe, who stated that he could not say what Culver had said when he handed the deed over to them, and it was put in a safe. The witness observed: "I don't know whether he said, 'Take the deed and keep it for me,' or, 'Take it and keep it.' I would not be positive it was either one, but it was something similar. I just inferred from it he wanted the paper preserved." On cross-examination the witness further said: "I cannot be positive what he said. He may have said something else. I cannot be positive what he said."

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The rule is well settled in every jurisdiction that delivery is an indispensable requisite to the validity of a deed whether it be a conveyance upon valuable consideration, or a voluntary conveyance in consideration of love and affection. And it is necessary that the delivery should be made in the lifetime of the grantor, for "there can be no delivery by a dead hand." A delivery after the grantor's death is no delivery.—*Jones v. Jones*, 6 Conn. 111, 16 Am. Dec. 30, and note; *Jackson v. Leek*, 12 Wend. (N. Y.) 107. Yet there may be an inchoate delivery in the grantor's lifetime which may become absolute on his death.—*Foster v. Mansfield*, 3 Metc. (Mass.) 412, 37 Am. Dec. 154. Cases of this kind sometimes present considerable difficulty.

Deeds are sometimes delivered by a grantor to a third person as a depositary, with instructions to deliver to the grantee on the contingency of the grantor's death. And it is commonly held that when this instruction is carried out such delivery will relate back to the prior delivery for the purpose of passing the grantor's title. The intention of the party is the substantive thing. The first depositary is a trustee holding the deed for the benefit of the grantee.—*Elsberry v. Boykin*, 65 Ala. 340; *Wheelwright v. Wheelwright*, 2 Mass. 447 3 Am. Dec. 66; *Taft v. Taft*, 59 Mich. 185, 26 N. W. 426, 60 Am. Rep. 291; *Sears v. Scranton Trust Co.*, 228 Pa. 126, 77 Atl. 423, 20 Ann. Cas. 1148-1150; 9 Am. & Eng. Ency. Law, 157.

If the deed is subject to be recalled by the grantor before delivery to the grantee, there is no effectual delivery by the maker.—*Prutsman v. Baker*, 30 Wis. 644, 11 Am. Rep. 592; *Davis v. Cross*, 14 Lea (Tenn.) 637, 52 Am. Rep. 177.

Under the above principles and those settled by our own authorities, we are of the opinion that the court

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erred in not excluding the deed from the jury as requested by the appellants.—*Fitzpatrick v. Brigman*, 130 Ala. 453, 30 South. 500; Id., 133 Ala. 242, 31 South. 940; *Tarwater v. Going*, 140 Ala. 273, 37 South. 330.

The present case cannot be distinguished in legal effect from *Fitzpatrick v. Brigman*, 130 Ala. 450, 30 South. 500, and neither is in conflict with *Fitzpatrick v. Brigman*, 133 Ala. 242, 31 South. 940, where additional contemporaneous acts shown by the evidence pointed very strongly to the grantor's intention to vest title in the grantee.

It is unnecessary to pass on the other assignments of error if the deed be excluded from evidence.

Reversed and remanded. All of the Justices concur.

ON REHEARING.

The real question involved in this case is not whether the grantor Culver entertained a general intention that the subject-matter of the deed should at some time and in some way pass to the grantee named; for that intention would always be quite plainly evidenced by the mere fact of preparing and signing the deed.

The true inquiry is, as settled by the authorities: Did he execute that intention by a sufficient delivery of the deed in his lifetime, intending by that act to *then* pass the title? It is, of course, conceded that the question of delivery is a question of fact, resting in the intention of the grantor, and, like other questions of fact, is generally to be submitted to and determined by the jury.—*Gregory v. Walker*, 38 Ala. 26; *Alexander v. Alexander*, 71 Ala. 295; *Cherry v. Herring*, 83 Ala. 458, 3 South. 667; *Fitzpatrick v. Brigman*, 133 Ala. 242, 31 South. 940; *Napier v. Elliott*, 162 Ala. 129, 50 South. 149; *Rickert v. Touart*, 174 Ala. 107, 56 South. 708. But the

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point of difficulty is in determining what act or acts on the part of the grantor will be sufficient to generate as a jury question the issue of delivery *vel non* in the first instance; and, with respect to the alleged act of delivery, what circumstances are relevant and competent to be considered.

In *Ellsberry v. Boykin*, 65 Ala. 340, it was said: "The fact (of delivery) rests in intention, and is to be collected from all the acts and declarations of the parties having relation to it." And this language has been several times repeated by this court.—*Napier v. Elliott*, 146 Ala. 213, 40 South. 752, 119 Am. St. Rep. 17; *Id.*, 162 Ala. 129, 50 South. 148; *Gulf, etc., Co. v. Crenshaw*, 169 Ala. 606, 53 South. 812.

In *Fitzpatrick v. Brigman*, 130 Ala. 450, 30 South. 500, the subject of delivery is fully discussed, and the principles which determine the sufficiency of a delivery, when made to a person other than the grantees or his agent, are clearly and precisely stated by TYSON, J., as follows: "(1) The delivery must be so effectual as to deprive the grantor of the right to revoke it, for so long as he reserves to himself the locus *poenitentiae*, there is no delivery—no present intention to divest himself of the title to the property. (2) The grantor need not expressly reserve to himself this right to repent, but if his act upon which a delivery is predicated does not place the deed beyond his control, *as a matter of law*, then his right of revocation is not gone. (3) The law does not presume, when a deed is handed to a third person, that it has been with the intention to pass title to the grantees. In order to make such an act a delivery to the grantees, the intention of the grantor must be expressed *at the time* in an unmistakable manner." (4) Although an alleged grantor has signed and acknowledged a deed and left it with his agent or attorney, if he

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then said nothing to indicate an intention that the deed should be considered as executed, and did no act other than leave it with his agent, "this act was utterly insufficient as expressing a present intention to divest himself of the title to the property described in the deed." With respect, also, to the source from which intention to deliver may be sought, in the absence of a manual delivery to the grantee, it is specifically declared that "the grantor must have, by some word expressed or act done, clearly indicated his intention, *at the time of its signing by him or subsequently while the deed is in his possession*, that the deed shall be considered as executed." Although this was an action of ejectment, tried before a jury, it was held as matter of law that the deed was not admissible.

On a second appeal (*Fitzpatrick v. Brigman*, 133 Ala. 242, 31 South. 940) the principles stated on the former appeal were approved; but, additional evidence bearing upon the grantor's intention in leaving the deed with his attorney having been introduced, it was ruled that the question of intention became an issue for the jury. To quote from the opinion of DOWDELL, J.: "What is necessary to constitute a delivery was fully discussed on the former appeal, and we content ourselves with what was then said as being sufficient for present purposes. What was Price's intention is a question of fact to be determined by the jury from *the attendant circumstances at the time*. And to this end it was competent on the trial to adduce evidence of the transaction between Price and Buck, and what was said and done *at the time* by both of said parties, as well as by Selheimer (the depositary) who acted as attorney for Price." (Italics ours.) It is worthy of note that, on the facts reported, the delivery to Selheimer might well have been

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treated as a *constructive delivery* to the grantee on the principles stated in Devlin on Deeds (3d Ed.) § 278.

In the later case of *Tarwater v. Going*, 140 Ala. 273, 37 South. 330, it was said, by SHARPE, J., that "delivery is essential to the complete execution of a deed, and a mere deposit of a writing, complete in other respects as a deed, with a person other than the one named as grantee, or his agent, when unaccompanied with any intention of passing title, is not a delivery such as is necessary to constitute a deed."

Perhaps the clearest and completest statement of the law on this subject is the following, by Dowling, J., in *Osborne v. Eslinger*, 155 Ind. 351, 360, 58 N. E. 439, 442, 80 Am. St. Rep. 240, 247: "Where the claim of title rests upon the delivery of the deed to a third person, the deed must have been properly signed by the grantor, and delivered by him, or by his direction, unconditionally, to a third person for the use of the grantee, to be delivered by such person to the grantee, either presently, or at some future day, or upon some inevitable contingency, the grantor parting, and intending to part, with all dominion and control over it, and absolutely surrendering his possession and authority over the instrument, so that it would be the duty of the custodian or trustee for the grantee, on his behalf, and as his agent and trustee, to refuse to return the deed to the grantor, for any purpose, if demand should be made upon him. And there should be evidence beyond such delivery of the intent of the grantor to part with his title, and the control of the deed, and that such delivery is for the use of the grantee. If the deed is placed in the hands of a third person, as the agent, friend, or bailee of the grantor, for safe-keeping only, and not for delivery to the grantee; if the fact that the instrument is a deed is not made known to such third person, either at the time it

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is handed over, or at any time before the death of the grantor; if the name of the grantee, or other description of him, is not given; and if there is no evidence beyond the mere fact of such delivery of the intent of the grantor to part with his control over the instrument and his title to the land—then such transfer of the mere possession of the instrument does not constitute a delivery, and the instrument fails for want of execution.” This language is incorporated in his text by Mr. Devlin, than whom there is no abler writer on the law of deeds, with the approving observation that “the rule was correctly and succinctly stated.”—Devlin on Deeds (3d Ed.) p. 435. Again, the same writer says (page 467), quoting from the opinion of Eastman, J., in the leading case of *Cook v. Brown*, 34 N. H. 460: “To make the delivery good and effectual, the power of dominion over the deed must be parted with. Until then, the instrument passes nothing; it is merely ambulatory and gives no title. It is nothing more than a will defectively executed, and is void under the statute. * * * There must be a time when the grantor parts with his dominion over the deed, else it can never have been delivered. So long as it is in the hands of a despository, subject to be recalled by the grantor at any time, the grantee has no right to it and can acquire none; and if the grantor dies without parting with his control over the deed, it has not been delivered during his life, and after his decease no one can have the power to deliver it.”—See, also, *Brown v. Brown*, 66 Me. 316, 321; Tiedemann on Real Property (2d Ed.) § 813; 3 Wash. on Real Property (5th Ed.) p. 314; monographic note to *Brown v. Westerfield* (Neb.) 53 Am. St. Rep. 537-556.

Turning now to the instant case, it is insisted that we have erred in our conclusion in that we have failed to consider *all* the facts in the case, which, it is urged,

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bring the case within the rule of decision in *Fitzpatrick v. Brigman*, 133 Ala. 242, 31 South. 940, and make the question of delivery one of fact for the jury.

The facts which counsel conceives to be competent for this purpose are (quoting from his brief): "That the deed was made to his wife, as grantee, and embraced all the property of Culver, the grantor; that it was in the handwriting of a resident lawyer and notary public in the town of Troy; that it recited a consideration of love and affection, and a further direction that his wife pay his just debts, and that followed very soon after and on the same day by his suicide, voluntarily shooting himself with a pistol."

That these general circumstances may fairly and satisfactorily show that Culver intended, in case he should carry out his apparently contemplated suicide, that the deed should find its way to the grantee and become operative *after his death*, we freely concede. But this is not the intent with which we are here concerned, nor is it capable of being given any effect unless evidenced by an instrument which conforms to the law of wills.

It is, we think, perfectly clear that the facts relied on by counsel are not acts or declarations of the grantor made at the time with respect to the making of the deed or its delivery. They are not circumstances nor occurrences attendant upon the making or delivery of the deed, and form no part of the res gestae of the transaction. Indeed, they are no more than the merely subjective recitals of the deed, coupled with the single fact of the grantor's suicide about six hours after its deposit with a stranger.

While the witness Kelsoe was not positive as to exactly what Culver said, the effect of his testimony was to show that the deposit of the deed was made with the request *to keep it*, and there is no room for inference

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that anything beyond this was said. Culver did not say what the paper was, and did not even mention the grantee's name. He merely handed a paper to Sykes, a saloonkeeper, who was a stranger and no sort of relation whatever to the grantee; and his injunction to keep it was in no possible sense an authorization to deliver it to the grantee, or to any one else.

There was absolutely nothing in the transaction pointing to a renunciation of Culver's control over the deed. And, had he repented of his suicidal purpose, and gone back to Sykes at any time afterward and demanded the return to him of the paper, the obligation of Sykes to so return it is too plain for controversy.

We are satisfied that the principles announced in the first *Fitzpatrick Case*, *supra*, are fatal to the admissibility of the deed offered here; and satisfied, also, that there is nothing in the evidence here offered that can suffice to bring this case within the decision in the second *Fitzpatrick Case*, *supra*.

We are not unmindful of the possible, nay probable, injustice that may be entailed upon innocent parties by our conclusion, for which we can experience only a profound regret. In this connection, however, we quote the just observations of Virgin, J., in *Brown v. Brown*, 66 Me. 320: "The intention of an owner of property in his attempted act of transferring it is not necessarily and always supreme. The law has prescribed certain plain rules to be observed in the execution of such important instruments as those by which the title to real property is transferred; and whatever courts may sometimes have done in their zeal to carry into effect the intention of parties, the law itself does not permit its salutary rules to be broken or bent to meet the exigencies of ignorance or negligence; deeming it better, on the whole, that the intention of a party in disposing

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of his property should occasionally fail, than that its important and firmly established rules made and applied for the benefit of all be overridden."

MAYFIELD, J.—(dissenting.)—I cannot concur in a reversal of this case. The reversal is based solely upon the ground that the deed in question was not delivered, and that the trial court erred in admitting it in evidence.

If the delivery of a deed was purely a question of law, the opinion in this case is almost, if not quite, conclusive, to the effect that it was not delivered. But unfortunately for the decision in this case, delivery is a question of fact and not of law. This court, in this case, decides as a matter of law that there was no delivery of the deed in question, while the facts in the record show that there was a delivery.

The undisputed facts are that the grantor signed, acknowledged, and delivered the deed to a third party: that within a few hours thereafter the grantor committed suicide; that a few hours after the suicide, this third party, to whom the deed was delivered by the grantor, told the grantee that the grantor had left with him a deed or paper for the grantee; and that, a few days thereafter, this same third party brought the deed to the grantee and made a manual delivery thereof. This deed was soon thereafter recorded, and the grantee, or those to whom she conveyed, have been in possession of the deed ever since. No one seems to have doubted the delivery of this deed until this suit was brought—more than 10 years after its delivery, and after the death of the grantor, and after the death of the third party to whom the grantor delivered it, and who delivered it to the grantee.

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How the mere fact that it is now impossible to prove what was said by the grantor when he delivered this deed to the third party, who thereafter delivered it to the grantees, renders this deed void, and shows that there was no delivery in law, though there was in fact, is more than I can understand. This court bases its decision solely upon the fact that a witness was found, who was present when the grantor delivered the deed to the third party, who thereafter delivered it to the grantees, and this witness was unable to remember what the grantor or the third party said, one to the other, when the delivery was made. The most and best that can be made of the testimony of this witness is that he does not now remember what was said or done, further than that the delivery was made and that the deed was placed in the safe of the third party, who thereafter delivered it to the grantees. The witness does not remember whether the grantees handed the deed to the witness and the witness handed it to the owner of the safe, or whether the grantor handed it to the owner of the safe, and the latter handed it to the witness, with instructions to place it in the safe. It is certain, however, that the owner of the safe, who was the witness' employer, was the custodian of the deed, and that he told the grantees, a few hours after it was left with him by the grantor, that he had it for her, and thereafter delivered it to her, and that she and those who claim under her have had it ever since.

It is true that death has now closed the lips of the grantor and the depositary, but the undisputed facts still live and continue to declare and proclaim the delivery of this deed, in unmistakable language. It is a striking case of *res ipsa loquitur*.

The grantor had made up his mind to end his own life, but desired to keep it a secret from the one he loved

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best on earth, and whom, he knew, it would grieve most. To this end he makes a deed, conveying to this person his beloved wife, all his earthly possessions or the chief part thereof, and signs and acknowledges it; and, not wishing to alarm her or put her on notice of his intention, instead of delivering the deed in person to her, he delivers it to a friend (with what instructions we know not, because both are now dead). He then ends his own life. Within a few hours thereafter, this friend, to whom he delivered the deed, informs the bereaved wife of the fact of the delivery to him, by her husband, of this deed; and as soon as the funeral is over and the husband is buried, he brings the deed to the house of the grantee and delivers it to her in person; she has it recorded, holds the property under it, sells the same, and delivers the deed to her grantees as a muniment of title, and, years and years thereafter, her grantees are sued for the lands conveyed thereby, the suitors relying solely upon the fact that there was no delivery of this deed by the grantor to the grantee; and this court holds that, because this grantee, or those who claim under her, cannot prove what was said by the grantor to the third party, when the delivery was made, there was no delivery to the grantee.

I do not believe that any one can read this record, and have any doubt as to the fact that the grantor intended that this deed should be delivered by this depositary to his wife, the grantee. No reason or intimation in the world is shown for any other intention on his part. If he had had any other intention, would the depositary have disregarded those instructions and delivered the deed, as he did, to the grantee? No reason on earth is shown or intimated for his disregarding the instructions, desire, or intentions of his dead friend.

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The effect of the ruling of the court in this case is to wholly destroy a record title to this land in question, for no other reason than that the grantee is not able to prove what the grantor said to the depositary, when he delivered this deed. The majority hold that if the grantee could not prove that the grantor, when he delivered the deed to the depositary, said, "Deliver this to my wife before or after I am dead," this would establish a good delivery; but that, because this proof cannot be made, the proof of delivery wholly fails.

I cannot agree to this conclusion. I do not think it is the law, or that it ought to be the law. To so hold tends to destroy all titles after the deaths of the parties to the delivery. After all the parties to a delivery are dead, I doubt that there could be proved, in one case out of ten, all the facts and circumstances, including the conversation, attending the delivery.

The court, by this decision, strikes down a perfect written and recorded title to land, by resort solely to a legal fiction. Such fictions are the creations of the courts, to promote justice, not to defeat it, as is unquestionably done in this case. To apply this fiction to this case, and thus defeat this grantee's title, is worse than the result of any technicality ever resorted to, in the days of feudalism, to preserve the titles of lands in the families of the lords and nobles. It is worse than livery of seisin, which was abolished long, long, ago, because not founded on reason.

This deed requested that, in consideration of the conveyance, the grantee should pay the debts of the grantor. These debts may have amounted to more than the value of the land. If this deed is stricken down, the wife not only loses all that she has paid out at the request of her dead husband, but is made liable to her grantees, on her warranty, for the value of the land. She was

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innocent of any wrong and, as she honestly believed, was carrying out the almost dying request of her husband. She loses her homestead, dower, and quarantine rights in this land, and loses twice its value—all because she cannot prove what her husband said to the depositary when he delivered the deed to him.

If I thought this was the law, I would consent to it, as hard as it is, but, believing, as I do, that it is not the law, I cannot consent to such a conclusion.

I am convinced that the delivery of the deed in question was a question of fact, and not one of law; and that the jury decided it correctly; and that the trial court, or this court, invades the province of the jury in taking the question from them.

DOWDELL, C. J., and SAYRE, J., concur.

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Ejectment.

(Decided January 16, 1912. 57 South. 837.)

1. Vendor and Purchaser; Bona Fide Purchaser; Constructive Notice.—The possession of real estate by a purchaser under an unrecorded deed is constructive notice only when its possession is open, notorious and exclusive, and possession jointly with the vendor is not such notice.

2. Same.—A prior possession, which has been terminated before the acquisition by a second purchaser of his rights, is not constructive notice to the second purchaser, though such prior possession, when actually known to the second purchaser may show actual notice to the antecedent claimant, in connection with other evidence.

3. Same.—A purchaser of land from a vendor in possession, is not chargeable with constructive notice of the rights of a third person who had previously purchased from the vendor the standing timber on the land, but had never been put in possession, and had merely cut and hauled away timber at intervals.

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4. Same; Actual Notice.—A purchaser of land in possession of the vendor with notice of the cutting and removal of timber thereon by a third person does not have notice that the cutting and removal is under a contract of purchase of the standing timber, unless the facts reasonably impress the mind of a reasonable man that the cutting and removal by the third person was as owner and not merely by permission of the vendor.

5. Same; Notice; Evidence.—Where the issue was whether the defendant had notice of the sale of the timber, the action being ejectment by a purchaser of standing timber against a subsequent purchaser of the land from the vendor in possession, evidence of plaintiff's entry on the land and cutting timber therefrom during three months before the sale to defendant was not admissible in the absence of evidence of defendant's knowledge thereof.

6. Same.—As against a prior purchaser of the standing timber a purchaser of the land was entitled to show that the land including the timber was not worth more than the price paid in order to show his good faith in the purchase of the lands with the timber.

7. Logs and Logging; Sale of Timber.—Without more a sale of standing timber passes no interest in the soil generally, and confers no right of possession exclusive of the general owner's possession, and until such purchaser entered on the land and severs the timber, the actual possession of the timber remains in the general owner.

8. Ejectment; Notice; Instruction.—An instruction on the issue of constructive notice must qualify the word notice by referring to it as constructive notice.

9. Evidence; Conclusion of Witness.—Where the land was in the possession of the vendor, a statement by a witness that he as agent of the purchaser of standing timber was in possession of the timber, though not in possession of the land, was a mere conclusion.

10. Appeal and Error; Harmless Error; Instruction.—Where the instructions are conflicting, and on appeal, the court cannot know which of the instructions the jury followed, the erroneous construction amounts to prejudicial error.

(Mayfield, J., dissents in part.)

APPEAL from Etowah Circuit Court.

Heard before Hon. JOHN W. INZER.

Ejectment by the Curtis-Attalla Lumber Company against Obal Christopher, revived after his death against G. E. Christopher and others, as his heirs. From a judgment for plaintiff, defendants appeal. Reversed and remanded.

The facts sufficiently appear from the opinion. The oral charge is set out in the opinion also.

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The following charges were requested by the defendant: (4) "The court charges the jury that a possession of land which does not exclude the owner is not such a possession as will constitute notice." (5) "The court charges the jury that, if the Curtis-Attalla Lumber Company and McDaniel were in possession of the land and timber jointly when Capt. Elliott bought, such possession would constitute no notice of the Curtis-Attalla Lumber Company's right in the premises, and the verdict of the jury must be for the defendant, if the case is otherwise made out by the defendant." (7) "The possession of growing timber on land, without any other interest in the land except the timber, whilst the owner of the land is in possession of the land on which the timber is growing, will never constitute notice of the rights of the person in possession of such growing timber." (9) "The court charges the jury that a possession of land which does not exclude the owner from possession is not such a possession as will constitute notice." (11) "The court charges the jury that the possession of the Curtis-Attalla Lumber Company, under the evidence in this case, does not constitute notice of its right." (12) "The court charges the jury that if McDaniel and the Curtis-Attalla Lumber Company were in possession of the timber jointly, and Capt. Elliott bought, such possession would constitute no notice of the Curtis-Attalla Lumber Company's rights in the premises, and the verdict of the jury must be for the defendant, if the case is otherwise made out by the defendant." (13) "If the jury are reasonably satisfied from the evidence that McDaniel was in possession of the lands in question, on which the timber sued for was growing, the law says he was in possession of said timber, and the fact, if it be a fact, that the Curtis-Attalla Lumber Company was also in possession of said tim-

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ber, without more, would constitute no notice of the Attalla Lumber Company's right." (14) Same as 12. (15) Same as 12. (16) "If McDaniel was in possession of the land conveyed to the defendant at the time of said sale, then the defendant is chargeable with no notice of plaintiff's claim by the cutting of the timber by plaintiff, unless defendant knew of said cutting." (17) "The court charges the jury that the possession, in order to give notice, must be exclusive—that is, the vendor must be out of possession, and his vendee in the exclusive possession; and if they are reasonably satisfied from the evidence that defendant bought the land without actual notice of plaintiff's claim, then their verdict must be for the defendant in this case, provided they are also reasonably satisfied from the evidence that McDaniel was in possession of the land at the time of said sale." (18) "The court charges the jury that if McDaniel and plaintiff were in the joint possession of the timber on the land in this case, such possession by plaintiff would not give notice of plaintiff's claim, and, unless defendant had actual notice of plaintiff's claim, then their verdict must be for the defendant."

At the request of the plaintiff the court gave the following charges: (1) "The court charges the jury that if, at the time of the purchase by Christopher, the plaintiff was in actual, open, and notorious possession of the timber described in the deed from McDaniel to Lewin, and this possession was exclusive and under claim of title, then, if the facts and circumstances were such that Elliott or Christopher either knew, or by the exercise of reasonable diligence could have known, of such possession, the verdict of the jury should be for the defendant." (2) "The court charges the jury that the possession of the vendee under an unrecorded deed, who is in the open, notorious, and exclusive possession

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and occupancy of real estate, claiming it as his own, is constructive notice of the vendee's title, and is as effective for the purpose of notice as though the deed had been duly recorded." (3) "The court charges the jury that the law charges the purchaser of land with notice of the possession of any part of such realty as may be in the actual, open, notorious, and exclusive possession of another claiming it as his own."

DORTCII, MARTIN & ALLEN, for appellant. Anything falling short of disseizin certainly would not constitute possession.—15 Am. Dec. 198. As to the rights conferred by the timber deed under which appellee claims see *Heflin v. Bingham*, 56 Ala. 566. The cutting and removing of timber occasionally is but equivocal possession and certainly not exclusive.—*O'Neal v. Prestwood*, 153 Ala. 443; *Mann v. Archey*, 110 Ala. 628; *Wells v. A. M. Co.*, 109 Ala. 430; *McCarty v. Nicrosi*, 72 Ala. 332. Declaration of an agent as to the act then being done are admissible as parts of the res gestae.—*Mobile L. Co. v. Baker*, 48 South. 119. Such a declaration was a declaration of a party in possession as to his ownership.—*Larkin v. Baty*, 111 Ala. 303; *Holman v. Clark*, 148 Ala. 291. The appellant must not only have been a purchaser without notice but a bona fide one as well, and hence, the evidence on that particular matter was relevant.—*Hickey v. McDonald Bros.*, 48 South. 1031; 1 Wig. 392; *Larkinsville M. Co. v. Flippo*, 130 Ala. 361. On these authorities it must be held that the court erred in its oral instructions to the jury, as well as in the charges given and refused. Where charges are contradictory in terms, prejudicial error will be presumed as the court cannot know which one of the theories the jury adopted.—*A. C. G. & A. v. Bullard*, 47 South. 578. Possession which does not exclude the

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owner is not such a possession as will constitute notice.—Authorities supra, and *So. C. & F. Co. v. Jennings*, 137 Ala. 247.

GOODHUE & BLACKWOOD, for appellee. No brief reached the Reporter.

SOMERVILLE, J.—The appellee sued the appellant in ejectment to recover possession of all of the timber of a certain size growing on certain lands. These lands were originally owned by one J. A. McDaniel, who sold the timber in question to one A. M. Lewin on February 28, 1903. Lewin's deed was not recorded until April 10, 1909. Lewin in turn sold and conveyed the timber to the Curtis-Attalla Lumber Company (plaintiff and appellee) on September 28, 1903, by deed recorded on October 17, 1903. On October 15, 1904, McDaniel sold and conveyed the lands of which this timber formed a part, by general description and without exception or reservation, to Obal Christopher, the defendant in ejectment, by deed recorded on November 1, 1904. McDaniel was continuously in possession of the land until October 15, 1904, when he delivered the possession to the purchaser, Christopher. The material and controlling issue in the case was whether the purchaser, Christopher, had, at the time of his purchase, actual or constructive notice of the rights of the plaintiff Lumber Company under their unrecorded deed. Upon this issue the evidence, though strongly preponderant in favor of the defendant, was in sharp conflict, and the jury found the issue in favor of the plaintiff. The assignments of error relate to rulings on the admission of testimony, and to instructions given and refused by the trial court.

The case of *McCarty v. Nicrosi*, 72 Ala. 332, 47 Am. Rep. 418, often approved and followed by the later

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cases, settles the following principles: (1) The possession of real estate by a vendee under an unrecorded deed operates as constructive notice of his rights only when his possession is open, notorious, and exclusive. (2) Such vendee's possession jointly with his vendor is not such notice.

An important qualification of the rule is that a prior possession, which has terminated before the second purchaser's rights are acquired, cannot operate as constructive notice to him.—2 Pom. Eq. Jur. § 662, cited and approved in *O'Neal v. Prestwood*, 153 Ala. 443, 449, 45 South. 251. Of course, however, such a possession, actually known to the second purchaser, may, especially in connection with other evidence, tend to show actual knowledge of the antecedent claim—a question quite distinct from that of the constructive notice resulting from contemporaneous possession, the effect of which does not depend upon actual knowledge of it.

A sale of growing timber may pass the legal title to the purchaser; but, without more, it passes no interest in the soil generally, and confers no right of possession that can be exclusive of the general owner's possession. The right to take possession of such timber can be executed only by entering upon the land and severing it from the soil; and until this is done the actual possession of the timber, undelivered as yet, remains in the general owner in possession of the land, as the quasi bailee of the owner of the timber. This, it seems to us, belongs to the category of self-evident truths, which need no demonstration.—See *Heflin v. Bingham*, 56 Ala. 566, 28 Am. Rep. 776.

It results from this that the principle of constructive notice to the defendant, through the plaintiff's alleged possession of the timber while still standing on McDaniel's land, cannot be applied to the facts of the

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present case; the only legitimate issue being as to actual notice on the part of Christopher, or his purchasing agent, of the rights of the claimant of the timber.

The case of *Bolland v. O'Neal*, 81 Minn. 15, 83 N. W. 471, 83 Am. St. Rep. 362, is quite different from the instant case. There the timber purchaser—to quote from the opinion—"took actual and open possession of about 20 acres of the central portion of the land, along the roads, and scattered buildings all over it. No one could go along that way without being challenged at once by open, notorious, adverse acts of possession. They had commenced to cut the trees down, and were in the act of cutting timber upon the land, when plaintiff purchased." This actual possession, adverse to the general owner, was visibly evidenced by the establishment on the land of a large lumber camp to accommodate a hundred men and many horses, including barns, sleeping quarters, cookhouse, storehouse, office, and blacksmith shop. It appears, therefore, that there was an extensive and exclusive possession of the *land* for the patent purpose of removing the timber, as distinguished from a mere occasional entry and cutting as in the present case; and, on such facts, it would seem that the Minnesota court correctly ruled that there was such a possession of the *timber* as imported constructive notice of ownership.

The evidence here shows that McDaniel remained continuously in possession of the land, and that the timber claimant never had possession of any part of the land; his action being confined to merely entering and cutting and hauling away the logs at intervals.

The trial court ex mero motu charged the jury as follows: "The fact, if it be a fact, that Christopher or Elliott, or both of them, knew or had notice that the timber had been cut or was being cut and removed

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from the land at or prior to the time of the alleged purchase on the 15th day of October, 1904, would not in this case be notice to Christopher or Elliott that the timber so cut was cut and removed by the plaintiff under a contract of purchase or ownership of the timber. The evidence in this respect must be sufficiently strong to reasonably satisfy you that Christopher or Elliott had such notice of the cutting and removing of the timber as would reasonably impress the mind of a reasonable man that the timber was cut and removed by plaintiff as owner of the timber, and not merely by the permission of or by consent of McDaniel. If defendant knew, or had means of knowing, of the cutting of the timber at or before the time of defendant's purchase, then he would be chargeable with notice of plaintiff's claim. The jury in ascertaining this matter will weigh and consider all the evidence in the case bearing upon the subject so as to ascertain reasonably therefrom what notice, if any, Christopher or Elliott had at the time of the alleged purchase of McDaniel of the timber and ownership thereof by plaintiff. Did Christopher or Elliott know, at the time of their alleged purchase of the land of McDaniel, that the plaintiff owned the timber the subject-matter of the suit, and if you find from all the evidence that defendant or Elliott, at the time of their purchase and payment for the land, knew reasonably of the ownership of the timber being in the plaintiff, then you should find in favor of the plaintiff."

This charge is, we think, a correct statement of the law as applicable to the evidence before the court, with the exception of a single paragraph, as follows: "If defendant knew, or had means of knowing, of the cutting of the timber at or before the time of defendant's purchase, then he would be chargeable with notice of plaintiff's claim." This was a flagrant contradiction

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of the first paragraph of the charge, and was an erroneous statement of the law. We cannot know which of these instructions the jury followed, and hence cannot hold that the erroneous contradiction of the first paragraph was not injurious error.—*A. C. G. & A. Ry. Co. v. Ballard*, 157 Ala. 618, 47 South. 578.

Charges 4, 5, 7, 9, 11, 12, 13, 14, 15, 16, 17, and 18, requested for the defendant, correctly state the law of constructive notice as above declared; and in view of some of the evidence, should have been given by the court, except that some of them are deficient in not qualifying the “notice” referred to as “constructive” notice.

Charges 1, 2, and 3, given for the plaintiff, are at least abstractly correct.

Since possession of growing timber, independently of any possession of the land itself, is a legal impossibility, the statement of the witness Smith that plaintiff’s agent was in possession of the timber, though not in possession of the land itself, was a mere conclusion, which should have been excluded.

It was error also to allow the plaintiff to prove the fact of its several entries upon the land and its cutting of timber during the months of July, August, and September, 1904, without some evidence of defendant’s knowledge thereof. In the latter case, such proof would be competent as tending to show defendant’s actual knowledge of plaintiff’s claim, in connection with McDaniel’s testimony that he had expressly informed defendant of it. For the same reasons it was error to allow plaintiff to prove the quantity of timber cut on those occasions.

The issue involved, in part, the bona fides of the defendant’s purchase of the land for a valuable consideration. As bearing upon his good faith, he should have been permitted to show that the property purchased by

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him was not worth in excess of the price paid, \$6,000. Hence the propriety of the question to defendant's witness Elliott, "Whether or not the \$6,000 was not the market value of the property set forth in the McDaniel deed to Christopher, including the timber on the land," in the rejection of which there was error.

For the errors noted above, the judgment will be reversed, and the cause remanded.

Reversed and remanded. All the Justices concur, except DOWDELL, C. J., not sitting. MAYFIELD, J., concurs in the reversal, but not in all of the opinion.

MAYFIELD, J.—I concur in the reversal and mainly in the opinion in this case; but I think there is a more important question which lies across the doorsill of this inquiry, that is not noticed in the opinion, and seems not to have been noticed by counsel nor by the trial court. This question, however, goes to the jurisdiction, and to the validity of the judgment, and therefore could and should be noticed at any stage of the proceedings, and the question should be considered by the court *sua sponte*. The question is: Will statutory ejectment lie, in this state, for the character of property sued for and recovered in this action?

The action is the statutory one, in the nature of ejectment. The property sued for and recovered is described in the complaint as follows: "All the saw timber 10 inches and larger at the butt, lying north of dry creek on the tract known as the E. P. Little place, and also all the timber 10 inches and larger at the butt on the northeast quarter of section 3, township 13, range 5 east, all situated in Etowah county, Alabama."

I am of the opinion that such action will not lie in this state, nor in any other state unless expressly authorized by statute; and I do not know of, and never

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heard of, any such statute; and by what investigation I have been able to give to the subject, I have been unable to find any authority, statutory or common law, which will authorize such an action. But for the fact that the learned trial judge, the able counsel in this case, and my learned Brothers, seem to think such an action will lie, I should have no doubt upon the subject. I am, however, of the opinion that they have merely passed the question sub silentio.

The text-writers and the adjudged cases, both English and American, state the law to be that ejectment will not lie for anything upon which an entry cannot be made, or the possession of which, if recovered, the sheriff cannot deliver. The action will therefore lie only for corporeal hereditaments, and not for those which are incorporeal.

It is also said, in the older cases, and copied into some of the texts, that: "A party may have ejectment for right of herbage, pro prima tonsura; that is to say, if a man has a grant of the first grass that grows on the land every year, he may maintain ejectment against him who withholds it from him.—*Ward v. Petifer*, Cro. Car. 362. So, also, ejectment may be had on a demise of the hay-grass and aftermath (*Wheeler v. Toulson*, Hard. 330), on the principle in these cases, that the parties, being entitled to all the profits of the land, are entitled also to the land for the same time, and no one can enter thereon while they are thus entitled without being a trespasser."—*Tyler on Ejectment & Adverse Enjoyment*, p. 39.

It must be remembered that in ejectment, in its original form, damages only were recoverable; but later the writ of habere facias possessionem was allowed, in conjunction with the damages, and in some jurisdictions the plaintiff might succeed as to damages, but fail as to

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possession, and in some jurisdictions counts for damages and counts for possession were allowed to be joined in the same action. But where the action is confined to that of possession of land and the mesne profits for withholding the possession of land, then the subject-matter or the interest in the land must be such as the sheriff can deliver possession of, to the plaintiff, under a writ of restitution.—Sedg. & Wait, Trial of Title to Land, §§ 96, 97.

The test as to when the action will lie is well stated in the above text, as follows:

“Sec. 100. Right of possession essential.—Whatever takes away the right of possession in *presenti* is fatal, and constitutes a complete defense to the action. The plaintiff must have a right of entry in virtue of or incident to some corporeal estate or interest in the premises, for the right to take actual possession of the land is the question to be tried, and constitutes the foundation of the action, whatever may be the character or source of the claimant’s title. Chitty says: ‘A party having a right of entry, whether his title be in fee simple, fee tail, in copyhold, for life, or years, may support an action of ejectment.’

“Sec. 101. True test as to when ejectment lies.—‘The trust test of this action,’ says the New York Supreme Court, ‘seems to be that the thing claimed should be a corporeal hereditament, that a right of entry should exist at the time of the commencement of the action, and that the interest be visible and tangible, so that the sheriff may deliver the possession to the plaintiff in execution of the judgment of the court.’ Hence rights or interests in land which lie in grant, being invisible and incorporeal, are not, at common law, the subject of this action.”

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If a plaintiff owned all the timber on land, and had the exclusive right of possession for the purpose of cultivating and marketing the timber, then ejectment by him might lie, though as to this there is grave doubt; but where a party merely purchases certain parts of the timber on land, has only a mere license or privilege to go upon the land for the purpose of removing the timber which he has purchased, of course ejectment will not lie. If the sheriff should put him in possession of his timber thus growing upon the land, he would necessarily have to put him in possession of the land, which did not belong to him, and of a possessory right which he did not claim.

That the action in this case will not lie, to my mind, is conclusively shown by the fact that the books show the report of no case wherein such an action has been sustained. If such actions will lie, surely they would have been brought before this one, and some of them would have found their way into the books.

As the books contain no reported cases like this, of course they contain no reason why the action in the specific case will not lie. The cases which have been brought, for minerals, mineral rights, mines, mining rights, for annexations to the soil such as houses, rooms, cellars, fixtures, horizontal divisions of land, vaults, for oil and gas wells, for made lands, land under water, etc., are not analogous to the extent of authorizing this action, though in some respects they are different from the ordinary actions of ejectment, and, in some respects, from this action. The chief difference is that in those actions there is an exclusive right to the possession of the thing recovered, and of the land upon which it is situated, for the use or purpose for which the thing recovered is sued and to be used.

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In the case at bar the plaintiff never purchased any interest in the possessory right of the land; he merely purchased certain timber growing upon the land, and while, of course, the purchase and sale is considered or treated as a contract with regard to land, to the extent that it must be in writing and must conform to the statute of frauds, yet the effect of the sale, when consummated, is to sever the timber from the land and to convert it into personalty, and the only interest the purchaser acquires in the land is a muniment or license to go upon the land for the purpose of removing or marketing his timber, which is thereafter a chattel and not realty.

If a man should purchase all the timber and growth upon land, and the exclusive right to grow or cultivate timber thereon for a number of years, then he might have such an interest as would support ejectment; but when, as in this case, he merely purchases a part of the timber of certain dimensions and descriptions, the effect of his contract is to sever the timber so purchased from the land and the other growing timber, and to convert it into a chattel, with a mere license or privilege to go upon the land for the purpose of removing the timber purchased. Of course, ejectment will not lie for a chattel, nor will a mere license or permit to go upon the land for the purpose of removing it support ejectment. This is the only right or title which the plaintiff claims in this action, and it will not, of course, support ejectment.

When the owner of land sells the mineral rights therein, and the right to mine the minerals, this, of course, under the same rule or fiction of law, works a severance of the two estates, but in that case each estate or interest remains and continues to be real estate; while in the case of the sale of certain described timber, the sale,

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though required to be in writing, converts the timber or trees sold into a mere chattel, with the privilege or license to go upon the land for the purpose of removing it.

It has been suggested that as ejectment at common law would lie for pasturage, herbage, and pannage, this is authority to support the action in this case; but this is not true, for the reasons above mentioned, and the subject is possibly best treated in Sedgwick & Wait on Trial of Title to Land, § 143. The reasoning is to me so conclusive that I here set it out: "Sec. 143. Pasturage and herbage.—The early cases, decided in England, with regard to the right to bring ejectment for pasturage and herbage, are of little value at the present day. They seem to have turned chiefly on questions of evidence and pleading. These rights somewhat resemble fishery rights. With regard to both, it is clear that they may exist separate from the interest in the soil. Lord Coke says that the grantee of herbagium terræ has a 'particular right in the land, and shall have an action quare clausm fregit; but by grant thereof and liverie made, the soile shall not passe.' Where the right to the soil and the herbage are in the same person, the recovery of the one in ejectment would carry the other with it; but that the owner of the separate herbage or pasturage rights would now be permitted to maintain ejectment may well be doubted. In an early case in the King's Bench, often cited, it was held that ejectione firmæ would lie for the pasturage of 100 sheep; but it does not appear from the report what the interest of the plaintiff in the soil was, and the question may have been only that of the proper description of the subject of the action; and in a later case in the Exchequer, where ejectione firmæ was brought upon a demise de herbagio et pannagio of no many acres, the court stated

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as a reason for inclining against the plaintiff, that 'herbage does not include all the profit of the soil, but only a part of it,' referring to the passage from Coke above cited. In *Ward v. Petifer*, and in *Parker v. Staniland*, in the King's Bench, it was said that ejectment would lie for the first crop growing upon the land; but in the second case the remark was entirely obiter, while in the first it was not needed for the actual decision of the question presented to the court, for the jury were told that if they believed that the plaintiffs had *only* the first crop (and not the entire profits through the year), they should return a special verdict to that effect, 'and leave it to the law whether an ejectment lies in this manner.' The case is chiefly remarkable for containing a suggestion, similar to that above noted as having been advanced with regard to fisheries, that the owner of the first crop will be presumed, in the absence of evidence to the contrary, to be the owner of the freehold. These decisions certainly cannot be regarded as sufficient to uphold ejectment for herbage or pasturage, when separated from the general ownership of the soil, and existing as a mere right to the profits of the land. Pannage, or the right to gather mast, which, in the nature of the interest, cannot be distinguished from pasturage or herbage, has been held insufficient to support ejectment. The Supreme Court of Massachusetts has decided that the grantee of the 'herbage or feeding' of land cannot maintain a writ of entry, and this decision, it seems to us, should be regarded as an authority in any state in which the action of ejectment prevails."

I know there is a great variety and contradiction of opinions as to the interest, if any which a purchaser or vendee of standing timber acquires in the land or soil upon which the timber is standing. The oldest cases, or a majority thereof, held that he acquired no title or

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ownership, therein; that it was a mere chattel sale, with a license or permit to remove it; and that the vendor could revoke the license or muniment at pleasure, until the timber was severed, and in some cases until it was removed from the land. This doctrine, however, in the main, has been abandoned, and the rule is declared to be that such a sale and alienation passes an interest in the land itself, and hence that the contract must be in writing and comply with the statute of frauds, and the conveyance comply with the statutes as to deeds or conveyances of land. But it has never been decided that it passes such title or interest as would support ejectment against the owner of the freehold.

If the contract of sale fixes no time within which the timber must be removed, then the law says it must be removed within a reasonable time. When the contract limits or fixes the time in which the removal shall be made, the great majority, if not the great weight, of authorities, hold that, on the expiration of this time limit, all right, title, interest, claim, and demand of the vendee in or to the timber or land ceases or is determined.

But some of the courts hold that the title to the timber does not so determine nor revert unless the contract expressly so provides, but only the right to enter upon the land is terminated; that the vendee after the expiration of the time limit still owns the timber, although he has no right to remove it—a paradox of contradictions. It is certainly illogical to hold that the contract and sale passed an interest in land, and that by virtue of the same contract, after the expiration of the time limit fixed by the contract, the vendee still owns the timber, but has lost his interest in the land. If the growing timber, which alone is sold and conveyed, is an interest in the land, when the interest in the land is

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ended by the very terms of the contract and deed, surely the title to the timber is also terminated, which is the interest in the land and the only interest sold or conveyed.

This court, however, is among the few courts which hold that the vendee still owns the timber, although he has no right to use or remove it.—*Magnetic Ore Co. v. Marbury Lumber Co.*, 104 Ala. 465, 16 South. 632, 27 L. R. A. 434, 53 Am. St. Rep. 73; *C. W. Zimmerman Mfg. Co. v. Daffin*, 149 Ala. 386, 42 South. 858, 9 L. R. A. (N. S.) 663, 123 Am. St. Rep. 58; *Heflin v. Birmingham*, 56 Ala. 566, 28 Am. Rep. 776.

In the case of *Zimmerman v. Daffin*, 149 Ala. 380, 389, 42 South. 858, 9 L. R. A. (N. S.) 663, 123 Am. St. Rep. 58, this court used the following language: "If the limitation as to the time of cutting and removal should be construed as a covenant on the part of the purchaser that it would cut and remove the timber in the time specified, the title to the timber would remain in the purchaser after the time limit had expired, and he could still enter upon the premises and remove the same at his pleasure, being liable to the vendor for such damages as he should cause in so doing. The vendor would also have a right of action against the vendee for a breach of the covenant in not performing the covenant as agreed; or it may be that the vendor would be entitled to remove the timber after the time limit himself, but not to appropriate it to his own use." Here is where the court went astray in following the Illinois rule, instead of the Michigan rule. The great number and weight of authorities are in line with the Michigan rule, and against the Illinois rule which our court followed.

If the sale of the timber originally was a sale of a chattel merely, as the oldest cases held, with a muni-

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ment or license to remove, then the Illinois rule would be correct and consistent; but if, instead, as all the authorities now hold, it is a sale and conveyance of an interest in the land itself, when the interest in the land is terminated and determined by the contract itself, then the title to the timber ceases and is terminated for the same reason and by the same contract. It is self-contradictory to say that the sale of growing trees is a sale of an interest in land, and that the interest in the land ceases and is terminated by the contract itself, and yet that the title to the timber or trees continues though the interest in the land is terminated by the same. Both propositions cannot be true; one must be false. If the sale of the trees was the sale of a chattel, then the title to them could remain, though the right to remove had ceased; but if the sale of the trees be not the sale of a chattel, but the sale of an interest in the land and soil, and this interest in the land or soil is terminated by the contract and conveyance, the vendee's interest in or title to the trees must of necessity lapse with the expiration of the contract.

This is well pointed out by the annotators, in the reports of the cases of *McRae v. Stillwell*, 111 Ga. 65, 36 S. E. 604, 55 L. R. A. 513; and *Midyette v. Grubbs*, 145 N. C. 85, 58 S. E. 795, 13 L. R. A. (N. S.) 278; and *Adkins v. Huff*, 58 W. Va. 645, 52 S. E. 773, 3 L. R. A. (N. S.) 649, 6 Ann. Cas. 246. The notes to these cases collect and review the authorities upon the subject, the conclusion of which is thus well stated by the annotators in 55 L. R. A. at pp. 535, 536: "The title to standing timber passes at the time of the conveyance, and the purchaser acquires the right to enter on the land for the purpose of cutting and removing the timber, and also an interest in so much of the soil where it grows as is necessary to sustain and nourish the trees

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until they are cut down. He cannot refuse to pay for the trees on the ground that the vendor had no title to the land, if his possession has not been disturbed. A provision as to the size or suitability of the trees conveyed will generally be held to refer to the time of the conveyance, rather than some time in the future, in the absence of anything to show a contrary intent. Where the conveyance specifies a particular time for the removal of the timber, the purchaser has generally been held to have forfeited all rights in timber not removed within the time specified, although a few cases hold that he still retains the title to the timber, but cannot remove the same, as his right of entry has gone. It would seem that the mere cutting of the trees within the time specified without their removal from the land is insufficient to preserve the purchaser's rights in the timber; but the manufacture of them into timber has been held a sufficient removal of them, although such timber still remains on the land."

I have examined all the authorities I can find upon the subject, and I think the conclusion of the annotator is not only supported by the great number and weight of authorities, but, as before stated, by reason and the very nature of things.

But as before stated, none of the reported cases hold that the vendee acquires any such interest or title as will authorize him to maintain ejectment against the vendee, or the owner of the freehold estate, while he might defend against an action of ejectment brought by the vendor, which was intended to prevent his entering and removing the timber which he had purchased, during the time mentioned in the contract or within a reasonable time if no time limit was fixed by the contract. Such defense seems to be recognized in the case of *Heflin v. Bingham*, 56 Ala. 566, 28 Am. Rep. 776.

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But this is quite a different thing from allowing such a defendant to bring ejectment for the timber. Such a defense as was interposed and recognized in that case might be good upon the theory that there was no ouster, and no unlawful entry or withholding, but that all things done were lawful, and therefore would not warrant the defendant's ejection when he was there for a lawful purpose. In other words, that where there has been no ouster ejectment will not lie.

I am not able to find any case in which the owner of the timber has been allowed to recover in ejectment against the owner of the freehold. I concede that he might recover against a bare trespasser.

It is well-settled law in this state that, in order for a plaintiff in common law or statutory ejectment to recover, he must recover upon both "a title and a right of entry existing at the commencement of the suit and continuing to the day of trial."—*Anderson v. Anderson*, 64 Ala. 403.

Applying these principles of law to the case in hand, it seems to me to be settled beyond doubt that plaintiff could not succeed in ejectment. If we conclude that the plaintiff was the absolute owner of the timber sued for, at the commencement of the action, and at the time of the trial, he certainly had no right of entry upon the premises at the time of the trial, and therefore no right of recovery in ejectment. The contract or deed under which he claimed title expressly limited the time of entry for removal to three years from the date of the deed, which was executed February 28, 1903. The trial was not had until April 13, 1909, more than three years after the time of entry had expired by the very terms of the deed, the only source of title by which he claimed.—See deed, Tr., p. 3.

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This court and all others have held that if the vendor fails to remove the timber within the time limit of the contract, and removes it thereafter, he is a trespasser and is liable to the owner of the freehold as such. It would certainly be an anomaly in law for a court, by its judgments, to order a sheriff or a party to a suit to put a trespasser upon the land of another.

If the plaintiff rightly recovered in this suit, and the judgment in his favor is executed, such will be the effect of the judgment and orders of the court in this case.

There is another insurmountable practical difficulty in the way of the plaintiff's recovery in this action. He claims only "the saw timber measuring 10 inches at the butt." All the authorities agree that such a deed only passes title to or includes such trees as were comprehended in the description at the date of the deed to wit, February 28, 1903. Who could go into a forest 11 years after a given date, and point out with certainty the trees, and those only, that corresponded to the stated measurements at the time in question? The feat would be an impossibility. Again, how far from the ground should the measurement be made? And how is the sheriff to put the plaintiff in possession of the trees purchased without disturbing or interfering with the defendant's undisputed and conceded rights?

An attempt to answer these questions will show that the action will not lie.

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John Deere Plow Company *v.* City Hardware Company.

Detinue.

(Decided February 8, 1912. 57 South. 766.)

1. *Sales; Contracts; Construction.*—All the provisions of a contract of sale must be construed together.

2. *Same; Title and Possession.*—The clause printed on the back and the clause printed on the face of the contract considered and it is held that the clause on the face of the contract modified the clause printed on the back of the contract, and together they constituted an agreement that the goods sold under the contract were to remain in the possession of the buyer until October 1, 1910, at which time the seller was to elect whether it would receive the buyer's note for them, or have them shipped back to it; hence, until the happening of that event or that time the seller had no right to sue for their possession.

3. *Same; Conditional Sales; Recovery; Contract.*—Where the action was detinue to recover goods delivered by plaintiff to defendant under a contract reserving title in plaintiff to the goods until payment of the price, and defendant by its pleas admitted that the goods were sold under such contract, but set up certain provisions of the contract, limiting operation of the clause reserving title, it was not necessary that defendant, in its rejoinder, should deny the contract or deny that the goods were sold thereunder.

4. *Pleading; Demurrer; Rejoinder.*—The fact that a rejoinder contains the same defense set up in the plea does not render it subject to demurrer.

5. *Same; Demurrer; Identity of Contract.*—The question whether the clause of a contract pleaded is an exact copy of the clause in the contract cannot be inquired into on demurrer.

APPEAL from Talladega City Court.

Heard before Hon. A. H. ALSTON.

Detinue by the John Deere Plow Company against the City Hardware Company to recover certain goods sold under a conditional contract. Judgment for defendant and plaintiff appeals. Affirmed.

LAPSLY & ARNOLD, and WHITSON & HARRISON, for appellant. The court erred in overruling plaintiff's de-

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murrer to defendant's rejoinder No. 2. Counsel indulge in argument to show this is true, but cite no authority in support of their argument.

KNOX, ACKER, DIXON & STERNE, and CECIL BROWNE, for appellee. There was no error in overruling demurters to the rejoinder as it is necessary to sustain an action of detinue that the plaintiff have a general or specific interest in the property, or right of possession at the time the action was commenced.—*Bank v. Barnes*, 82 Ala. 60. The fact that the rejoinder set up the same defense as the pleas did not render it subject to demurrer.—*Hightower v. Ogletree*, 114 Ala. 94; *Pope v. Glenn Falls I. Co.*, 136 Ala. 670.

SIMPSON, J.—This is an action of detinue, by the appellant against the appellee, for the recovery of certain agricultural implements mentioned in the complaint.

The defendant filed a number of pleas, among other things describing the conditional contracts under which the goods were bought, and claiming that the defendant had complied with the conditions of said contracts, and that the articles named therein had become vested in the defendant, freed from the claim of title reserved therein by the plaintiff.

The plaintiff filed a number of replications attaching thereto copies of the three contracts of sale, and claiming that the plaintiff is entitled to demand and recover the articles named therein under article 7, which is identical in all of the contracts, being among the conditions of sale printed on the back of the contract and in words and figures as follows, to-wit: "It is also agreed that the title to, and ownership of and the right to the immediate and exclusive possession, upon demand

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either oral or written, to all goods which may be shipped as therein provided, or during the current season, shall remain in, and their proceeds in case of sale shall be the property of, said plow company, and subject to its order until full payment shall have been made for the same by the undersigned in money; but nothing in this clause will release the undersigned from making payment as herein agreed."

There were a number of rejoinders, but the only contention of the appellant is that the court erred in overruling plaintiff's demurrer to the second rejoinder, which rejoinder is in words and figures as follows, to wit: "For further rejoinder the defendant alleges that the plaintiff sold the chattels sued for to defendant under a contract providing that all such goods as should be sold for cash by defendant were to be paid for in cash on the first of each month following their sale, and that all such goods sold by defendant in any period between inventory dates were to be settled for by the note of defendant due at the regular maturity dates of the purchase price for said goods, and that all notes taken by defendant on such sales were to be indorsed by defendant and sent to the plaintiff as collateral, and that said notes were to be recorded by the plaintiff and returned to the defendant for collection, and that the plaintiff would, at the end of each such period, check up all cash remitted and credit the defendant with certain cash discounts, and that all such goods in the hands of defendant furnished under said contract on hand and unsold on October 1, 1910, that were in merchantable condition should belong to the plaintiff, and were, at plaintiff's option, to be settled for by the defendant's note due one year later than the terms of such contract, or should be delivered to the plaintiff f. o. b. cars Anniston, Ala.; and defendant alleges that this

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suit was brought prior to the 1st day of October, 1910, and before, by the terms of said contract of sale, said goods which were so sold defendant by plaintiff should become the property of or belong to the plaintiff."

The brief of appellant admits that said rejoinder correctly sets out one of the provisions of one of the contracts of sale attached as Exhibit D to the replications; and states that "the essential question sought to be presented by plaintiff's demurrer to defendant's rejoinder No. 2 is the construction of clause 7 which is contained in all of the contracts on which plaintiff bases his right of recovery."

This seems to be a correct statement of the gist of the controversy, and it must be admitted that, according to a literal interpretation of said clause 7, standing alone, it would seem that the plaintiff reserved the right to demand and recover the goods at any time, without regard to whether the defendant was complying with its part of the contract or not, but it must be connected with the other provisions of the contract, which is a contract of sale, and it is evidently a reservation for the security of the plaintiff against any failure of the defendant to comply, on its part, with the stipulations of the contract; and, considering the fact that this clause is printed upon the back of the contract, and the clause set out in said rejoinder No. 2 is written upon the face of one of the contracts, said last-named clause must be considered as a modification of clause 7 as to the goods purchased under said contract. This is evident, not only because all clauses of a contract must be construed together, but because of the fact that the parties wrote this clause in the face of the contract, while the other is evidently a part of a printed form, indorsed on the back. Without inquiring whether or not said clause is an exact copy of a clause in the contract of

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sale (which cannot be inquired into on demurrer), the provisions, as set out, show that the agreement between the parties was that the goods sold under that contract were to remain in the possession of the defendant until October 1, 1910, at which time the plaintiff was to elect whether it would receive a 12 months' note for the same, or have them shipped back to it.

There is a great deal of unnecessary and prolix pleading in this case, and the demurrers to this rejoinder are, in the main, mere general demurrers. In so far as they allege that the rejoinder contains the same defense set up in the pleas, it is not subject to the demurrer.—*Hightower v. Ogletree*, 114 Ala. 94, 21 South. 934; *Pope v. Glenn Falls Ins. Co.*, 136 Ala. 670-675, 34 South. 29; *Continental Fire Ins. Co. v. Brooks*, 131 Ala. 614, 30 South. 876.

It was not necessary to deny the contracts or that the goods were sold thereunder, for the reason that the defendant was claiming that they were sold under said contracts, had so claimed in its pleas, and was by this rejoinder merely specially setting up one of the provisions of said contract as the ground of defense. The construction given to the contract shows that it does allege certain terms of the contract which do operate as a waiver of the right to sue during the operation of the special provisions.

So, without deciding whether said rejoinder might not have been subject to other possible causes of demur-
rer, it is not subject to the causes alleged and insisted upon.

The judgment of the court is affirmed.

Affirmed. All the Justices concur.

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Detinue.

(Decided February 8, 1912. 57 South. 821.)

1. *Contracts; Construction; Written and Printed.*—In construing a contract partly printed and partly written, the court should construe the whole instrument with a view of ascertaining the intention and purpose of the parties, giving to the written parts precedence over those which are printed.

2. *Sales; Conditional Contract; Retaking Possession; Time.*—Several clauses of the contract bearing on time and terms considered, and it is held that under it the seller's right to resume possession was limited by the provision extending credit to October 1, 1910, and that the seller could not enforce his right to retake the property prior to that date.

APPEAL from Anniston City Court.

Heard before Hon. THOMAS W. COLEMAN, JR.

Detinue by the John Deere Plow Company against the City Hardware Company. Judgment for defendant, and plaintiff appeals. Affirmed.

The contract referred to was a regular contract of sale of certain farming implements manufactured by plaintiff, and contained a great many conditions, but with a retention of title in the John Deere Plow Company, and a right to retake. The body of the contract contains this agreement: "It is expressly agreed and understood that the terms named therein, which hold good until October 1, 1910, are not to be considered a precedent for the future." The seventh clause, referred to in the opinion, is as follows: "It is also agreed that the title to, the ownership of, and the right to immediate and exclusive possession, upon demand, either oral or written, to all goods which may be shipped as herein provided, or during the current season shall remain in,

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and their proceeds in case of sale shall be the property of, said plow company, and subject to its order until full payment shall have been made for the same by the undersigned in money; but nothing in this clause will release the undersigned from making payment as herein agreed." The payments referred to were to be made in cash when any of the goods were sold for cash, and when the goods were sold on time they were to be settled for by note, due at regular maturity date, and the notes taken for the machinery or implements sold were to be sent to the plaintiff as collateral, listed by them, and returned to the defendant for collection. The suit was filed on the 22d day of April, 1910.

LAPSLY & ARNOLD, for appellant. The court erred in its oral charge to the jury, as it put an improper construction upon the contract. The court also erred in its charges given for the defendant.

TATE & WALKER, WILLETT & WILLETT, and KNOX, ACKER, DIXON & STERNE, for appellee. Contracts must be construed as a whole with preference given to the written parts over the printed parts.—*Bolman v. Lobman*, 79 Ala. 67; *Thornton v. S. & B. R. R. Co.*, 84 Ala. 112; *Tubb v. L. & G. I. Co.*, 106 Ala. 659. When so construed, the contract in question did not give the right to retake until the limit of credit had expired, and plaintiffs were not entitled to recover in detinue.—*Reese v. Harris*, 27 Ala. 301; *Huddleston v. Huey*, 73 Ala. 215; *Cooper v. Watts*, 73 Ala. 254; *Seals v. Edmonds*, 73 Ala. 295; *Banks v. Barnes*, 82 Ala. 607.

MAYFIELD, J.—This is an action of detinue by appellant against appellee, to recover certain chattels mentioned in the complaint. The right of the respective

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parties to maintain or defend the action depends solely upon the construction to be given a certain contract of sale, by which appellant sold to appellee the chattels in question. The contract in question is a conditional one of sale, by which the vendor, appellant here, retained the title to the chattels sold upon certain conditions specified in the contract of sale. The real difference between the contentions of the parties is as to whether or not the vendor had the right to retake the possession of the property sold and delivered, at the time the action was brought, or whether the time at which it could retake possession, on account of the breach of the conditions of the contract, was postponed to a later date than that at which the suit was brought.

It is not denied by the vendee, appellee here, that the sale was a conditional one, and that under certain provisions of the contract the vendor could retake possession of the property sold; but it contends that the time at which the contract provided the vendee might retake possession was fixed at October 1, 1910, while the action was brought in April, 1910. If this be true, of course, the plaintiff had no right to recover, at the time it brought the action, and therefore must fail.

On the other hand, it is contended, by the vendor that by paragraph 7 of the contract of sale (which the reporter will set out), the plaintiff was entitled to possession, upon demand, either oral or written, of all the goods which might be shipped under the provisions of the contract, or during the current season.

The trial court construed the contract in accordance with the contention of the vendee, to the effect that the plaintiff had no right, under the written and printed contract, to the possession of the property at the time the action was brought, but further ruled that the parol evidence was in dispute as to whether or not there was

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a subsequent agreement between the parties by which the plaintiff was entitled to possession at the time the suit was brought, and, accordingly, submitted this question to the jury, which found in favor of the defendant, appellee here.

As to the rulings of the court upon the question of the subsequent parol agreement, and as to the finding of the jury of the facts as to such agreement, no error is assigned, and no objection is here made by appellant.

The trial court, in its oral charge to the jury, instructed them to the effect that under the terms of the written and printed contract the plaintiff was not entitled to the possession of the property at the time the suit was brought, and for this reason refused a written requested charge to the plaintiff, asserting the reverse of the proposition. It is conceded that the same question of law is raised by both rulings, and that the correctness or incorrectness of the one necessarily determines the propriety or impropriety of the other.

We agree with the trial court as to the construction placed upon the written and printed contract. To give clause 7 construction and effect intended by appellant would make it wholly inconsistent with the other provisions and conditions of the contract. On the other hand, with the construction placed upon it by the trial court, this provision of the contract can be reconciled with the other provisions thereof.

The contract in question is quite lengthy, and is conceded to have been partly written and partly printed; and section 7 thereof is one of a great number of provisions printed on the back of the contract, but referred to and made a part of it by provisions in the body of the instrument, which were in writing.

It is a sound and well-settled rule of construction of contracts that, in arriving at a proper interpretation,

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the court should examine the whole instrument with a view of ascertaining and carrying into effect the purpose and object the parties had in view, and thus give some effect to each clause, and reconcile apparent discrepancies if practicable. Courts will never presume that parties intended to insert in their contracts provisions wholly incompatible and irreconcilable one with another. It is likewise a well-settled rule of construction that as to instruments which are partly printed and partly written, that which is written shall have the greater weight, because of the presumption that greater attention has been bestowed upon the written parts of the contract.

As was said by this court in *Bolman v. Lohman*, 79 Ala. 67, per STONE, C. J.: "The printed form is intended for general use without reference to particular objects and aims. That which is written is supposed to be dictated by the particular intention and purpose of the parties contracting."

Applying these rules of construction to the contract in question, we have no hesitancy in agreeing with the trial court as to the construction proper to be placed upon this contract. We find one of the written provisions of the contract to be as follows: "It is expressly agreed and understood that the terms made herein shall hold good until October 1, 1910, and are not to be considered a precedent for the future." This being written into a printed form of contract used by the vendor in making such sales is suggestive, at least, of the idea that the contract in question was somewhat different from the usual contracts made by it in such cases. It was provided by the last clause of section 7, of the printed conditions, after stipulating that the vendor should have the right to the immediate and exclusive possession upon demand, as follows: "But nothing in this

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clause will release the undersigned (the vendee) from making payment as herein agreed." It was agreed in the contract that the vendee would make payments thereon until October 1, 1910, and it would be inconsistent to hold that the vendor could retake the property, and yet hold the vendee to the payment of the purchase price.

No error appearing in the record, the judgment of the trial court is affirmed.

Affirmed. All the Justices concur.

Bruce, et al. v. Sierra.

Probate of Will.

(Decided February 8, 1912. 57 South. 709.)

1. *Wills; Revocation; Instrument Revoking.*—Under sections 6172 and 6174, Code 1907, an instrument revoking a will to be operative must be signed by the testator or someone for him, attested by at least two witnesses, who must subscribe their names in the presence of the testator.

2. *Same.*—Under section 6174, a subsequent will legally executed revokes a prior will without any proof of the contents of the will.

3. *Evidence; Weight.*—The weight to be given to the evidence of a witness is for the jury, and the court may not reject the testimony of a witness who testifies to the due execution of a will and who states that he gives his best recollection.

4. *Trial; Objection to Evidence; Necessity.*—Where a witness who was a lawyer, but who did not qualify as an expert, testified that the will was properly executed, and no objection was made to the testimony on the ground that it was a mere conclusion, and the facts on which he based his opinion were not elicited, the testimony could not be excluded on a general objection.

5. *Statutes; Construction; Re-enactment After.*—Where a statute has been judicially construed, and is re-enacted without modification, the re-enactment adopts the construction previously given the statute, and it must receive the same construction.

(Mayfield, J., dissents.)

APPEAL from Mobile Probate Court.

Heard before Hon. PRICE WILLIAMS, JR.

[Bruce, et al. v. Sierra.]

Petition by Jane Bruce Sierra for the probate of the will of Catherine L. Bruce, deceased, and Catherine L. Bruce and others appeared to contest the probate. From a decree admitting the will to probate, contestants appeal. Reversed and remanded.

The basis of the contest was that, long after making said proposed will, Catherine L. Bruce made and executed, in the presence of witnesses as required by law, another will covering the same property, thereby revoking said former will.

SULLIVAN & STALLWORTH, for appellant. The testimony of the witness Inge was in full accord with all of the authorities holding that a witness properly testifies to the best of his recollection and belief.—1st Greenleaf on Evidence, § 440; *Head v. Shaver*, 9 Ala. 792; *A. G. S. R. R. Co. v. Hill*, 93 Ala. 520; *Elliott v. Dyche*, 80 Ala. 378. The witness Inge being an expert, his testimony that the will was “properly attested,” was a shorthand rendition of the facts, in connection with his testimony that it was executed in the presence of himself and the young lady in his office, who signed it as witnesses.—*Hood v. Disston*, 90 Ala. 377; also citations, 3 Mayfield’s Dig. p. 476, § 820. The testimony tending to prove the execution of a subsequent will, its weight and sufficiency were for the jury, and the court erred in excluding it.—*Holmes v. Brownlee*, 71 Ala. 132; *Sanders v. Stokes*, 30 Ala. 432; *Hart v. Freeman*, 42 Ala. 567. The evidence of the contestants tending to prove the issue tendered by them, and formed by the court, the court erred in giving the general affirmative charge for the proponent.—*Penton v. Williams*, 163 Ala. 608.

ELLIOTT G. RICKARBY, and NORVELLE R. LEIGH, for appellant. There are three things essential to revoke

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the will. First, it must be in writing. Second, it must be signed by the testator, or by some one for him, and it must be attested by at least two witnesses who must subscribe their names in the presence of the testator.—Sections 6172, 6174, Code 1907. There is no evidence in this case that the last prerequisite was complied with.—*Moore v. Spear*, 80 Ala. 129. There was no error in excluding on a general motion, the statement of the witness that the subsequent will was properly executed. In any event, it was opinion evidence, and the defense did not make out their case.

ANDERSON, J.—Section 6174 of the Code of 1907 provides that a will otherwise regular can be revoked only by the destruction of same, with the intention of revoking it, or “by some other will in writing, or some other writing subscribed by the testator, and attested as prescribed in the first section of this article,” i. e., section 6172. It is therefore plain that the revoking must be executed with all due formality, and the compliance with every legal requirement must appear affirmatively as follows: (1) The will must be in writing; (2) it must be signed by the testator, or some one for him; (3) it must be attested by at least two witnesses; (4) the witnesses must subscribe their names in the presence of the testator.

We think there was evidence from which the jury was authorized to find the existence of all of the essential facts tending to show the legal execution of a subsequent will by Mrs. Bruce and a revocation of the one undergoing contest. It is true the witness Inge was not absolutely positive in his testimony, but qualified it with to his belief and the best of his recollection; but this was not the mere expression of an opinion in the proper sense of the term. It was the assertion of the

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existence of facts, qualified by the admission that the recollection of the witness was not clear and distinct, but that he may be mistaken. This qualification, though weakening the force of the testimony, and, in the opinion of the jury, may have deprived it of any value as evidence, did not authorize the rejection of same; it was for the jury alone to determine the weight of same.—*Head v. Shaver & Adams*, 9 Ala. 791; 1 Greenl. on Ev. § 440; *A. G. S. R. R. Co. v. Hill*, 99 Ala. 520, 9 South. 722, 30 Am. St. Rep. 65; *Elliott v. Dyche*, 80 Ala. 378.

It has been suggested in brief of appellees' counsel that Inge did not testify that the will was signed by the witnesses in the presence of the testatrix. This he did not do in exact words; but he stated that Mrs. Bruce executed the will, and that it was "properly attested." If it was "properly attested," then it was attested by two witnesses in the presence of the testatrix. Whether the opinion of Inge, who was a lawyer, was or was not competent as expert evidence matters not; for the conclusion or opinion of a layman or of a nonexpert was material proof of the proper execution of the will, and, if improperly proven, the opposing party should have objected thereto at the time, and not sit silently by and permit the contestant to prove material facts by conclusions and opinions, and then subsequently move to exclude all of the testimony which made a case for the jury, simply because some one link thereof had been proven by opinions or conclusions, and to which no objection was interposed at the time of deliverance. Had Inge not qualified as an expert, he may have done so upon objection to his opinion upon the proper ground; or, if his testimony was an opinion or conclusion, upon objection thereto, he may have stated the facts or details upon which he based said opinion or conclusion.

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At any rate, we think all established rules of evidence, as well as fairness, forbid the granting of a general motion to exclude all the evidence, which makes out a case for the jury, simply because some of it, though consisting of material facts, was, perhaps, subject to specific objection, owing to the manner of rendering same, but which said objection was never interposed. The probate court improperly excluded all of the contestants' evidence, and with this evidence before the jury the proponent was not entitled to the general charge.

It is true there was no proof of the contents of the second or last will; but the jury could infer from the evidence that the testatrix executed a will subsequent to the one offered for probate, and if this was true this last will was a revocation, under the statute, of the one offered.—Section 6174 of the Code of 1907. The court, in speaking of this statute as it existed in the Code of 1867, in the case of *Barker v. Bell*, 49 Ala. 284, said: “The point is made for the proponents that in order to revoke a will, it is not sufficient that the existence of a subsequent will should have been found by the jury; but it must be found different from the former, with the nature of the difference. The proposition is not correct. One of the ways of revoking a will is by making a subsequent one.—Rev. Code, § 1932.”

Whether this was or was not the proper construction of the statute originally, we cannot now decide, as it was brought forward in the succeeding Codes as so construed, unchanged up to and included in the Code of 1907. It also received the same construction in the cases of *Wilson v. Bostick*, 151 Ala. 536, 44 South. 389, and *Allen v. Bromberg*, 147 Ala. 317, 41 South. 771. “It is an elementary rule of statutory construction that re-enacted statutes must receive the known, settled construction which they had received when previously of

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force; for it must be presumed the Legislature intended the adoption of that construction, or they would have varied the words, adapting them to a different intent.—Sutherland on Stat. Con. § 256. The rule has been of frequent application to the Code, in its construction. Uniformly the Legislature has been presumed to have known the settled construction of statutes, of which there was a substantial re-enactment, and to have intended the adoption of such construction.—Brickell's Dig. 349, § 2. And to this rule the statute of wills has been subjected; and, in so far as it may be a substantial re-enactment of its predecessor, which was borrowed from the English statute of frauds, the known construction the English statute had received prior to its enactment here has been followed.”—*Barnewall v. Murrell*, 108 Ala. 366, 18 South. 831.

The case of *Knox v. Knox*, 95 Ala. 495, 11 South. 125, 36 Am. St. Rep. 235, is in apparent conflict with the authorities, supra, but a careful reading of the opinion will demonstrate that the holding was largely induced by a failure of the bill of exceptions to disclose all the evidence. Moreover, only so much of the will of 1883 as was sought to be established, and which was claimed to have not been revoked by the will of 1889, was that part which purported to be the execution of a power under certain deeds to the testatrix, Mrs. Knox. The court said: “Looking at the two instruments together, we cannot say the one executed in 1883 was not a testamentary exercise of the power authorized by the deeds of trust referred to; and there is certainly nothing in the evidence to show that the power thus exercised was subsequently revoked.” For aught that appears, the will of 1883 was a mere devise under the power of the deeds of the trust property, and had no relation to her individual property, and was the mere execution of a power

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under sections 3426 and 3429 of the Code of 1907, and the last will and codicil may have related to her estate not included in the trust estate, and may have specifically preserved the former will, in so far as it was an attempt to execute the power conferred by the deeds therein referred to in said will of 1883. On the other hand, if this case is in conflict with the other cases construing the statute, it should be overruled as being opposed to the statute as then construed, and which cannot be upheld upon the theory that the readoption of the statute in a subsequent Code was a ratification of the changed construction of same, as the statute was not construed or considered in said *Knox Case*. It was not referred to, and seems to have entirely escaped the attention of the court. Upon another trial, there will be no impropriety in permitting proof of the extent and value of the testatrix's estate.

The judgment of the probate court is reversed, and the cause is remanded.

Reversed and remanded.

DOWDELL, C. J., and SIMPSON, McCLELLAN, SAYRE, and SOMERVILLE, JJ., concur.

MAYFIELD, J.—(dissenting.)—I cannot concur in the last part of the opinion nor in the decision in this case. I do not believe that it was ever intended by the lawmakers of this state to provide that the mere fact of executing one written instrument revokes or destroys all others of the same kind, executed by the same person, no matter what may be the contents or the provisions of either. I do not believe that section 6174 of the Code, as to the revocation of wills, so provides, or was ever intended by the lawmakers to so provide. The writer of this dissent, as code commissioner, wrote this

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section of the Code as it now appears, and he had no idea that it would or could be so construed as to have this effect. I am of the opinion that that clause of this section of the Code here construed is one of those provisions of the law that is too plain in meaning to admit of construction. There is nothing open for construction. It means what it says, and says what it means. The whole section is intended, as clearly appears upon its face, to limit the mode and means of revoking written wills. After mentioning some of the modes, as burning or tearing, canceling, etc., there follows the clause in question, which says, "by some other will in writing, or some other writing subscribed by the testator and attested as provided in the first section of this article." This clause merely mentions an agency or instrument by which the testator may revoke his will, another written will, or some other writing, executed with the same formalities as required in case of a will. This, I think, is for form, providing that, if he ever does execute another will or any other instrument required to be executed in the mode that a will is executed, he thereby revokes all other wills, no matter what may be the contents of the last instrument so executed.

There is not a whit more reason for saying that the mere fact of executing a will revokes all former ones than there is for saying that executing any other written instrument requiring the formalities of a will, such as a deed or a mortgage, revokes them. The statute merely provides that the revocation must be evidenced by a writing executed in the manner provided for the execution of the will itself.

The law does now, and has always, provided, that if a man conveys by deed land theretofore devised the deed revokes the will pro tanto. Is it possible that, if a man executes a deed after making a will, conveying any

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land, he thereby revokes his will in toto, irrespective of the contents of the will or of the deed? A holding to that effect, I submit, would be no more unreasonable than the construction given to section 6174 of the Code.

It is but just and fair to my Brothers on the bench to say that they would not give the statute the construction here given it, if it were now up for construction for the first time. They are now acting upon the theory that the statute was so construed in the case of *Barker v. Bell*, 49 Ala. 284, and that the statute has since been readopted, with this construction placed upon it, and that the case has been subsequently followed, and thus has become a rule of property, and that the court is not now at liberty to depart from that construction, however erroneous it may be. To this reasoning I cannot agree. In the first place, I do not think the case of *Barker v. Bell* did or could so construe this statute as to bind all future legislators in the re-enacting of the statute, or future courts in the construction thereof. The court in that case could bind the parties in that suit, and no one else, and bound them only in that particular suit, and not in any other; and under our law, if there had been a subsequent appeal in that particular suit, that decision would not have been binding upon the parties thereto, nor upon the court rendering it, much less upon other parties or other courts.—Code, § 5965. I do not doubt nor dispute that the writer of the opinion in the case of *Barker v. Bell* had an erroneous conception of the purpose, effect, and meaning of the section of the Code under consideration, if we may judge his conception by what he said in the opinion. Nor do I deny that the opinion in that case is in accord with the decision in this case; but both are equally wrong. But the opinion in the former case upon this point was dictum, because not necessary to a

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decision of the cause then in hand. It is true that the writer in that case says: "The point is made for the proponents that, in order to revoke a will it is not sufficient that the existence of a subsequent will should have been found by the jury; but it must be found different from the former, with the nature of the difference. The proposition is not correct."

But the allegation of contest in that case, and which the contestant was required to prove, was that the second will revoked the first, and was executed with the intent to revoke it. Some of the grounds were as follows: "After the execution of said written instrument propounded for probate, said decedent revoked the same by the execution of a subsequent will, to wit, in May or June, 1868. (3) After the execution of said paper propounded for probate, the said decedent revoked separately each bequest and devise therein mentioned by the execution of another will in writing, with the intention of revoking the same; (4) or by the execution of a paper signed by said testator, and attested by three witnesses, who subscribed their names thereto as witnesses in the presence of said decedent, and at his request, with the intention of revoking separately each devise and bequest as aforesaid."

It will be observed that the contestant in that case was required to prove that the last will *revoked* the first. While, as the judge said, he would not necessarily be required to prove the bequests or devises of the last, yet he would be required to prove that the second revoked the first. The second might have been intended only to revoke the first, and may not, therefore, have contained any disposition of the property; yet it would, under the law and the statute and the allegations of contest, have been just as effective to revoke as if it had

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disposed of the testator's property inconsistently with the provisions of the first will.

So it clearly appears that the case in 49 Alabama did not decide what the majority conclude that it decided, and if the opinion speaks otherwise it is a mere dictum, and binds nothing, not even the lips that uttered it. As was said by an old judge: "An obiter dictum is a gratuitous opinion, an individual impertinence, which, whether it be wise or foolish, right or wrong, bindeth none, not even the lips that utter it.—Old Judge. "Taken from the title page of a work on Obiter Dicta, published by John D. Allen, New York, 1885.—*Hart v. Stribling*, 25 Fla. 433, 6 South. 455, 456.

If it can be said that the case of *Barker v. Bell, supra*, decided as the majority think it did, and that the statute has been readopted with that construction attached, then I answer that contention by saying that *Barker v. Bell* was overruled by *Knox v. Knox*, 95 Ala. 495, 11 South. 125, 36 Am. St. Rep. 235, and that the statute in question has been three times readopted by the Legislature since the latter decision, without change, and with the last and proper construction placed upon it—a construction by the majority conceded to be correct but for the decision in *Barker v. Bell*.

It is true that the opinion of the court in the case of *Knox v. Knox* does not refer to the statute nor to the case of *Barker v. Bell*; but the court must be presumed to have known the law, as it was in force at that time—that is, the statute and the decision in question—and we should not assume that it overlooked same, merely because it did not mention said statute and decision in the opinion. No opinion ever attempts to specifically refer to and name all the statutes or all the decisions applicable to the case decided. It is a no more violent presumption to suppose that the Legislature had in mind

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the case of *Knox v. Knox*, when they on three several occasions readopted this statute, than it is to suppose that they had in mind the case of *Barker v. Bell*, which was written and published 20 years before the case of *Knox v. Knox*.

In the case of *Knox v. Knox, supra*, the statement of facts shows that the testatrix executed six separate and distinct testamentary papers, only one of which was denominated a "codicil;" and the trial court instructed the jury, as matter of law, that the testamentary papers offered for probate—three in number—were not revoked by the subsequent wills. One of the charges was as follows: "As a matter of law, that portion of the will of 1883 propounded for probate was not revoked by the wills said to have been executed by Anna O. Knox in the years 1887, 1889, 1890." And this court on appeal, affirmed the decrees of the circuit and probate courts, probating these three instruments, and held that there was no error in the charges.

It is to my mind made certain, beyond doubt, that the court and writer of the opinion in the case of *Knox v. Knox* construed the statute, no less than was done in the case of *Barker v. Bell*, and in effect overruled the last-mentioned case, if it decided what the court now holds it decided.

As before stated, I do not think the latter case decided what my Brothers hold it decided; but, if it did, it was in effect overruled by *Knox v. Knox*. This last case, as my Brothers concede, construes the statute as it reads; *Barker v. Bell* does not, but construes the statute, not as it reads (if it decides what my Brothers think it does), but it in effect writes a new statute, or a new provision in the statute, which the Legislature did not see fit to insert.

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Our statute on the subject of revocation of wills is practically an adoption of the English statute (1 Vict. - c. 26, § 20), which has been practically adopted in most all the states of the Union, and has been construed in most all the courts of England and of the United States, and in all, so far as I can ascertain, as construed by this court in *Knox v. Knox*.

The American cases are collected in the Century and Decennial Digests, under the subject, "Wills," sections 456-641, and sections 179 et seq., respectively, most of which are in accord with the text-writers on the subject. The American & English Encyclopedia of Law states the rule as follows, as to revocation by another will (volume 30, p. 624): "A duly executed will may operate as a revocation of a prior testamentary instrument by reason either of an express clause of revocation, or of an inconsistent disposition of the previously devised property."

It is said by Mr. Williams (Executors), and quoted in a note in 30 Am. & Eng. Ency. Law, p. 626, as follows: "The principle applicable is well expressed in Mr. Justice Williams' book on Executors. He says: 'The mere fact of making a subsequent testamentary paper does not work a total revocation of a prior one, unless the latter expressly, or in effect, revokes the former, or the two be incapable of standing together; for, though it be a maxim, as Swinburne says above, that as no man can die with two testaments, yet any number of instruments, whatever be their relative date, or in whatever form they may be (so as they be all clearly testamentary), may be admitted to probate as together containing the last will of the deceased. And if a subsequent testamentary paper be partly inconsistent with one of an earlier date, then such latter instrument will revoke the former as to those parts only where they are

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inconsistent.' This passage truly represents the result of the authorities."

Mr. Redfield (*Law of Wills*, vol. 1, *p. 351, p. 357) states the rule as follows: "The mere fact that one is shown to have made a subsequent will does not amount to a revocation of the former one, unless it appear that it contained an express clause of revocation, or that its contents were inconsistent with those of the former, or where the later one disposes of the testator's entire estate. And where the same estate is given to different persons, in two wills of different dates, the later bequest is an entire revocation of the former. But where the same property is given in the same will to different persons, such persons take as tenants in common; there being no sufficient ground to presume that the testator had changed his purpose while making his will."

That these statutes were in force when these texts were written and cases decided, is shown as follows: "To prevent the admission," says Chancellor Kent, "of loose and uncertain testimony, countervailing the operation of an instrument made with the formalities prescribed, it is provided that the revocation must be by another instrument, executed in the same manner, or else by burning, canceling, tearing, or obliterating the same by the testator himself, or in his presence, and by his direction. This is the language of the English statute of frauds, and of the statute law of every part of the United States."—4 Kent, 520, 521.

This clearly shows the object and purpose of the statutes. The effect given our statute in this case is to inhibit a man from making two testamentary instruments, or even any written instrument executed with the formalities of a will, without revoking all prior testamentary instruments, unless he should denominate the last will a codicil to the former. This I do not think

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to be the law, and it will be destructive of thousands of wills if it is made the law. There are a great number of cases in this state in which two, three, and four separate testamentary instruments have all been probated as the last wills and testaments. In one case, an instrument which was in form a deed, but could not take effect as such, was given effect as a will, though executed after the will and after the codicil to the will. The three instruments, though separate, were all given effect to as wills.

In a note to the case of *Knox v. Knox*, as reported in 36 Am. St. Rep. 241, it is said: "All testamentary papers, no matter how numerous, should be proved together as one will.—*Pepper's Estate*, 148 Pa. 5 [23 Atl. 1039]. A paper may be referred to and made a part of a will, if such paper is then in existence and can be identified.—*In re Shillaber*, 74 Cal. 144 [15 Pac. 453]; 5 Am. St. Rep. 433, and note. Notes made by a testator, payable at his death, folded up in his will and referred to therein, and remaining in his possession at his death, are a part of the will.—*Fickle v. Snepp*, 97 Ind. 289, 49 Am. Rep. 449, and extended note."

The evil of the rule announced will be clearly shown in this case, if contestant is able to prove the execution of a second will. It will, as thus far appears from the record in this case, be shown that the testatrix made two testamentary dispositions of her property, or a part thereof, without any evidence to show that she ever intended to revoke the first by the last, but, at most, only to provide for a person not provided for in the first; but, as the last will is lost and its contents are not proven, it cannot be probated, yet nevertheless it will revoke the first, and thus testatrix's will, whether expressed in one or two instruments, will be entirely defeated, and therefore, in law, she will have died intes-

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tate, and all the objects of her bounty will be entirely deprived of their property, or, at best, of the interest therein that testatrix clearly intended that they should take.

I am wholly unable to understand the reason or the logic in any such holding. Instead of being a rule to preserve the rights of property, its necessary effect is to destroy such rights.

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Appointment of Administrator.

(Decided February 8, 1912. 57 South. 714.)

1. *Evidence; Marriage; Presumption.*—While all reasonable presumptions are indulged in favor of marriage, such presumptions are overcome by proof that the relations were in their origin meretricious and unlawful, and such meretricious relation is presumed to continue until there is proof that the parties were married, but this presumption also whether of law or fact may be overcome by satisfactory proof of cohabitation, acknowledgment and reputation.

2. *Marriage; Common Law Marriage.*—The evidence examined and held to warrant a finding of cohabitation with matrimonial intent, although unlawful in its inception, and that after the death of the first husband, the parties renewed their matrimonial pledges, and entered into a common law marriage, as affecting the woman's right to letters of administration as a widow.

APPEAL from Jefferson Probate Court.

Heard before Hon. J. P. STYLES.

Sallie Prince and Lizzie Edwards filed rival petitions for letters of administration upon the estate of John Edwards, deceased. From an order granting letters to petitioner Edwards, petitioner Prince appeals. Affirmed.

JERE C. KING, for appellant. A man can have but one lawful wife living.—*Salter v. The State*, 92 Ala. 68;

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Matrin v. Martin, 22 Ala. 86; 141 Mass. 385. Where a former marriage has been established, there can be no marriage from cohabitation and repute.—19 A. & E. Enc. of Law, 1206; 55 N. J. E. 479; 102 Tenn. 148; 24 Colo. 456. No valid common law marriage was here shown.—80 S. W. 1027; 35 South. 570; 72 Pac. 1061; 54 S. E. 613; 4 N. E. 408; 53 Miss. 37; Bishop Marriage & Divorce, sec. 506. The court, therefore, erred in finding a common law marriage relation to have existed between deceased and petitioner, to whom he granted letters of administration.

MCNEAL & JONES, for appellee. In civil cases proof afforded by cohabitation, reputation and the conduct of the parties is sufficient.—Jones on Evid. sec. 88 and notes. The cases cited by appellant from this and other courts are not in point, as the only claim made by Lizzie Edwards is that she was the common law wife of John Edwards after the death of her first husband, and this is amply supported by the evidence and authority.—63 Mo. 501; 38 Md. 93; 108 N. W. 765; 43 Am. Rep. 677; 5 C. & F. 163; 14 N. H. 114; 3 Dana. 232; 45 N. J. E. 116; 127 Ill. 379; 86 N. Y. 487; 99 Am. St. Rep. 172. Under the Alabama authorities she was entitled to marry even at the time of the first attempt.—*Parker v. The State*, 77 Ala. 47; *Campbell v. Gullatt*, 43 Ala. 54; *Beggs v. The State*, 55 Ala. 108; *Tart v. Negus*, 127 Ala. 301; *Bynon v. The State*, 117 Ala. 80; *Moore v. Heineke*, 119 Ala. 627.

SOMERVILLE, J.—Appellant and appellee each filed her petition to be appointed as administratrix of the estate of John Edwards within 40 days after his death; appellant claiming to be his mother, and appellee claiming to be his widow. On hearing the petitions,

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the probate court found, as a matter of fact, that appellee was the widow of John Edwards, and entitled to the preference claimed, and ordered that the letters of administration should issue to her as prayed. Appellant excepted to the finding of fact, and also to the decree granting administration to the alleged widow.

The evidence showed, without dispute, the following facts: Appellee, Lizzie Edwards, married one Jake Jemison in Birmingham about 1895. After living with him three or four years, he ran away, after first attacking and nearly killing her by cutting. Appellee never saw him again, but was told (at some unstated time) that he was in Selma. After Jemison's desertion of her, she cooked for a living until 1903, in which year she married John Edwards; this marriage, according to her testimony, was at the courthouse in Birmingham, and was solemnized by a person who was said to be Judge Porter (then probate judge); John Edwards having in his hand a paper represented to be a license. Appellee married Edwards under the name of Lizzie Ray; but the record of marriages "covering the period in which petitioner, Lizzie Edwards, claims to have been married to John Edwards" shows no license issued to John Edwards and Lizzie Ray. They then lived together as husband and wife, and while so living appellee was informed, in 1908, that Jake Jemison was dead, and this fact she communicated to John Edwards. After Jemison's death, she and Edwards continued to live together, treating each other as husband and wife, recognized as husband and wife by their neighbors, and looked upon in the community as such. They called each other husband and wife, and on one occasion (after Jemison's death) she introduced him to the witness Frank, on the streets of Birmingham, as her husband. This status continued until Edwards' death in May, 1911.

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Appellant's contention is that, however satisfactorily these facts and conditions might ordinarily evidence a common-law marriage, their effect is here completely destroyed by the fact, as alleged, that appellee's connections with Edwards was originally meretricious and unlawful; that its original character is, as matter of law, presumed to continue until a change to a lawful status is shown; and that the burden is on appellee to distinctly show that a new marriage contract or agreement was made between her and Edwards subsequently to the death of Jemison. And it is insisted that there is nothing in the record to show such a consensus between them.

The general principle is thus stated: "While all reasonable presumptions are in favor of marriage, yet they are overcome by proof that the relations were in their origin illicit and unlawful. The illicit relation is presumed to continue until there is proof that the parties were married. This presumption, whether of fact or of law, may be overcome by satisfactory proof of cohabitation, acknowledgment, and reputation."—19 Am. & Eng. Ency. Law (2d Ed.) 1206, f.

Some authorities have very properly held that, where the relation was at first notoriously meretricious—that is, lustful and without matrimonial intent—as distinguished from unlawful merely, and especially where the parties willingly choose the meretricious state in defiance of law and social custom, there being no impediment to lawful matrimony, the evidence of a change to lawful matrimony ought to be clear and strong.—*Klipfel v. Klipfel*, 41 Colo. 40, 92 Pac. 26, 124 Am. St. Rep. 96, 103, and note page 113. Mr. Browne, in his note to *Appeal of Reading, etc., Co.*, 113 Pa. 204, 6 Atl. 60, 57 Am. Rep. 448, 461, says: "The presumption of the continuance of the illicit cohabitation is not so easily over-

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come where it appears that the parties have manifested a preference for a meretricious union. In such a case, the authorities seem to be uniform that, in the absence of some evidence of a change in the relation between the parties, they are presumed to continue in that relation"—citing *Collins v. Collins*, 80 N. Y. 9; *Badger v. Badger*, 88 N. Y. 553, 42 Am. Rep. 263; *State v. Worthingham*, 23 Minn. 528; *Yardley's Estate*, 75 Pa. 207, and other cases.

After a very full review of the authorities, both English and American, Mr. Browne states the following conclusions: (1) That an illicit connection is presumed to continue until there is evidence to the contrary. (2) That, where the parties have manifested a desire to form a matrimonial union, the presumption will be rebutted, so as to make the question one of fact, by the slightest circumstance; and that a mere cohabitation, without any apparent change, after the parties have the right to contract a valid marriage will suffice to justify a submission of the question of marriage to a jury, and in fact require it. (3) That, where the parties are shown to have preferred a meretricious connection, something more than continued cohabitation, after the impediment to a legal marriage has been removed, will be necessary to rebut the inference of the continuance of the original character of the cohabitation; there must be evidence to satisfy the mind of an actual change in the relation between the parties, or at least of a desire for a change. (4) That, where there is any evidence to rebut this inference of continuance of an illicit union, the question is one of fact.

Upon a survey of the authorities reviewed by Mr. Browne, and also of the many later ones, we approve the justice and propriety of his conclusions.

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In *Badger v. Badger*, 88 N. Y. 554, 42 Am. Rep. 263, it is correctly declared that "a change may occur and be satisfactorily established, although the precise time or occasion cannot be clearly ascertained."

In *State v. Worthingham*, 23 Minn. 528, the following language is used: "An intercourse originally unlawful and lustful from choice undoubtedly raises the presumption that its character remains such during its continuance. But this is a presumption, not of law, but of fact, for the consideration of the jury in connection with the particular facts and circumstances of the case. In the case at bar, it appears that the cohabitation between the parties had its origin, in part at least, in a desire for marriage, and under the promise that such a relation should be assumed as soon as defendant could procure a divorce from his then wife. This indicates that the parties regarded the married state as one preferable to that of concubinage, and weakens somewhat the force of the presumption ordinarily attaching to an original illicit cohabitation. The weight which is to be given to it, however, in this, as in every other, case rests exclusively with the jury, in the exercise of its best judgment, under proper instructions from the court."

In the well-considered case of *Adger v. Ackerman*, 115 Fed. 124, 129, 130, 52 C. C. A. 568, it was said, per Sanborn, J.: "But the true rule and the great weight of authority is that, inasmuch as the law itself and all its presumptions deprecate illegal, and favor lawful, relations, slight circumstances may be sufficient to establish a change from an illicit to a legal relation, and proof of its time or place is not indispensable. * * * The principle of law is that, where parties who are incompetent to marry enter an illicit relation, with a manifest desire and intention to live in a matrimonial

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union, rather than in a state of concubinage, and the obstacle to their marriage is subsequently removed, their continued cohabitation raises a presumption of an actual marriage immediately after the removal of the obstacle, and warrants a finding to that effect." In accord with this is the text of 19 Am. & Eng. Ency. Law, 1208, d.

Some courts have made the presumption just stated depend upon the fact of a *ceremonial* second marriage as being indispensable to show the matrimonial intent; others have required that at least one of the parties should have entered into the illicit relation in ignorance of the obstacle, and some require that the parties shall have been informed of the removal of the obstacle; while others hold such knowledge unnecessary. We apprehend, however, that, while all of these matters may be material aids in the solution of the question of marriage *vel non*, they are not ordinarily to be regarded as conclusive, and are to be considered, along with all the other evidence, simply for what they are worth.—See *Moore v. Heineke*, 119 Ala. 627, 24 South. 374.

It is true that courts have no right to marry people who never wished nor intended to be married, and equally true that it is not their office or policy to place a premium on the defiance of law and social custom by lifting lust to the level of honorable matrimony. But these results cannot be reasonably feared from the practical application of the principles we have declared.

The cases, presenting all phases of this much-discussed subject, will be found fully reviewed in the case notes to *Appeal of Reading, etc., Co.*, 113 Pa. 204, 6 Atl. 60, 57 Am. Rep. 448, 461; *Klipfel v. Klipfel*, 41 Colo. 40, 92 Pac. 26, 124 Am. St. Rep. 96, 113; and *Chamberlain v. Chamberlain*, 68 N. J. Eq. 736, 62 Atl. 680, 3 L. R. A. (N. S.) 244, 111 Am. St. Rep. 658, 6 Ann. Cas. 483, 484.

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There are several cases from highly authoritative jurisdictions which are not in harmony with our views.—*Cartwright v. McGown*, 121 Ill. 388, 12 N. E. 737, 2 Am. St. Rep. 105; *Collins v. Voorhees*, 47 N. J. Eq. 315, 20 Atl. 676, 14 L. R. A. 364, 24 Am. St. Rep. 412. But these are opposed to the great and increasing weight of authority.

It only remains to apply the foregoing principles to the facts of this case, and we are clearly of the opinion that it was open to the trial court to find that the entire connection between John Edwards and appellee was with matrimonial, and not with meretricious, intent, notwithstanding it was unlawful in its inception; and to find, also, that, at some time between the date of Jemison's death (of which they were both informed) and the death of Edwards (a period of two or three years), these parties renewed their matrimonial pledges, and entered into a new understanding that they were thenceforth husband and wife in law, as well as in fact, without let or hindrance. Such a finding should not be disturbed, unless clearly erroneous, and we cannot so regard it.

Affirmed. All the Justices concur.

State *v.* Ide Cotton Mills.

Tax Proceeding.

(Decided January 18, 1912. 57 South. 481.)

1. *Taxation; Assessment; Right of State to Appeal.*—Section 2252. Code 1907, was repealed by Acts 1911, p. 159, and hence, the state cannot appeal from an order of the Commissioner's Court fixing the value of property for taxation.

2. *Same; Legislative Power.*—The legislature has power to authorize an appeal by taxpayers from assessments of their property for taxation, and to deny right of appeal to the state.

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APPEAL from Calhoun Circuit Court.

Heard before Hon. HUGH D. MERRILL.

Proceedings to raise the taxes and fix the value of the property of the Ide Cotton Mills for taxation. From a judgment of the circuit court dismissing an appeal by the state from an order of the Court of County Commissioners fixing the value of the property, the state appeals. Affirmed.

R. C. BRICKELL, Attorney General, and W. L. MARTIN, Assistant Attorney General, for the State. The state had the right of appeal under section 2252, Code 1907, and the appeal should have been heard by the circuit court.—*State v. Bley*, 162 Ala. 239.

WILLETT & WILLETT, for appellee. The right of appeal as given by section 2252, Code 1907, is denied the state by section 36c, Acts 1911, p. 159, et seq. The legislature has the right to deny to the state the right of appeal, and to grant it to the tax payers.—*Dorman v. The State*, 34 Ala. 215; *State v. Bley*, 162 Ala. 239.

MAYFIELD, J.—The sole question presented for decision by this appeal is whether or not the state, under the existing statutes, can take or prosecute an appeal from an order or decree of the county commissioners' court, fixing the value of property for taxation.

The county tax commissioner for Calhoun county, at the July term of the commissioners' court for that county, reported to the court that the taxes of the Ide Cotton Mills were assessed on \$260,000 valuation, and recommended a raise of the assessed value to the amount of \$411,000. The taxpayer, being cited, appeared, and the hearing was continued by the court until September 4, 1911, when a hearing was had and a "judgment ren-

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dered, fixing the value at \$260,000;" the court thus declining to make any raise in the assessment.

On the same date (September 4, 1911), the state of Alabama applied for and obtained an appeal to the circuit court of Calhoun county. This appeal to the circuit court came on for hearing on the 4th day of November, 1911, and the taxpayer, the appellee, moved to dismiss the appeal, which motion was granted and the appeal dismissed by the circuit court and from that judgment of dismissal the state takes this appeal.

Under the statutes as they appear in the Code of 1907, there is no doubt that both the state and the taxpayer are given the right of appeal from an assessment by the court of county commissioners to the circuit court, or a court of like jurisdiction. The statutes expressly so provide. Section 2252 of the Code reads as follows: "2252. Appeals.—Tax commissioners and tax-payers may appeal within thirty days to the circuit court, or court of like jurisdiction, from the order of the board." This section, however, is a mere codification of a part of an act amending the general revenue bill of 1903. This section, as thus written, was construed to this effect in the case of *State v. Bley*, 162 Ala. 239, 50 South. 263.

It is a matter of common knowledge that a new revenue bill, and more or less amendments thereto, are passed at nearly every session of the Legislature. As has been more than once remarked by this court, it is to be regretted that it seems impossible to maintain any permanency in the revenue and tax laws of the state. When they have been codified, they have in nearly every instance been materially changed before the Code could be printed.

The last general revision of the revenue laws was by act of March 31, 1911 (Acts 1911, pp. 159-191). A

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large part of this act dealt with the same subject of taxation and assessments which was theretofore regulated by article 10 of chapter 45 of the Code, which particular article relates to the "Tax Commissioner," which is under the chapter "Taxation." Section 2252 of the Code, above quoted, was a part of that article and chapter so revised by the general revenue bill of 1911. The part of the last act, relating to appeals in cases like the one under consideration, reads as follows: "36C. From any final assessment of tangible or intangible property for taxes, fixed by any officers, board or tribunal charged with the duty of assessing tangible or intangible property for taxes, or with the duty of revising or reviewing assessments of property for taxes, *the owner* in case the property lies entirely within one county, may appeal to the circuit court or any court of like jurisdiction in which the property lies, and in case the property lies in more than one county, *the owner* may appeal to the circuit court or any other court of like jurisdiction in any county in which any of the property lies. All such appeals may be taken within thirty days after the date of the assessment or after the date of the final decision of the officer, board or tribunal. * * * From the judgment of the trial court, either party may appeal to the Supreme Court within thirty days from the rendition of the judgment."

It thus appears that section 2252 of the Code was repealed or substituted by the above-quoted provision. It also appears that no appeal is now authorized, by the state or by its agencies, from orders and judgments of courts of county commissioners as to assessments; but that an appeal from such orders or judgments is allowed to the tax-payer. It further appears, however, that an appeal is allowed to both parties to the Supreme Court from judgments or orders in the circuit

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courts in such tax proceedings. It follows that the state's appeal to this court was not authorized, and that the circuit court properly dismissed it, on motion.

The right of appeal in such proceedings is a right conferred by statute, and must be exercised in the mode and within the time prescribed by the statute. It is perfectly competent for the Legislature to authorize an appeal by the taxpayer and to deny the right to the state. The right of appeal is denied to the state, but allowed to the citizen, in most all criminal proceedings and in some quasi criminal proceedings; and we know of no reason which will prevent the Legislature from allowing it to one party and denying it to another, in a proceeding like this.

The original act of 1903 (Acts 1903, § 1, p. 195), out of which section 2252 of the Code was made, authorized an appeal or review from the assessment by the state, but not by the taxpayer, and it was, on account of this discrimination and of other objections, assailed by a taxpayer, Bley. This court in that case (*State v. Bley*, 162 Ala. 239, 50 South. 263) held that the statute was valid, notwithstanding it allowed an appeal to the state, or to its agencies, but denied such appeal to the taxpayer.

The effect of the codification was to authorize the appeal by both parties; but the subsequent Legislature of 1911 saw fit to change it by allowing the taxpayer to appeal from the orders or judgments in the commissioners' courts, and denying, by failure to provide, an appeal therefrom by the state. The wisdom or the policy of these various changes, allowing the right of appeal to one party and denying it to the other, is a question for the consideration of the Legislature, and not one for the courts.

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This change of the law having been wrought by a change of the revenue laws of the state, and by the passage of the general revenue bill, it is therefore relieved of some questions which might otherwise arise as to the sufficiency of the title of the bill to authorize this particular provision. This for the reason that "general revenue bills" are excepted from the operation of section 45 of the Constitution, touching the requirements as to the titles of bills.

It follows that the trial court properly dismissed the appeal, and its action in so doing is hereby affirmed.

Affirmed. All the Justices concur, save DOWDELL, C. J., not sitting.

McLaughlin v. Beyers.

Imposition of Cost.

(Decided February 8, 1912. 57 South. 716.)

Appeal and Error; Judgment to Support; Continuance.—A party is not entitled to accept a continuance and reject the terms imposed by the court, and the imposition of costs as a condition to granting a continuance is within the irreversible discretion of the trial court, hence, the order and judgment imposing costs as a condition to a continuance will not support an appeal.

APPEAL from Jefferson Circuit Court.

Heard before Hon. E. C. CROWE.

Action by Cora Beyers, pro ami, against George H. McLaughlin. From an order imposing cost as a condition to granting defendant's motion for a continuance, he appeals. Appeal dismissed.

STERLING A. WOOD, for appellant. Under the testimony the court should have granted a continuance without

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the imposition of costs.—*Spann v. Torbert*, 130 Ala. 541.

W. J. WHITTAKER, and FRANK S. WHITE & SONS, for appellee. The imposition of costs as a condition to a continuance was the exercise of the irreversible discretion of the court, and such an order will not support an appeal.

SOMERVILLE, J.—It was formerly held by this court that the granting or refusing of continuances was *entirely* within the discretion of the trial court, and that its exercise was “beyond the jurisdiction of the appellate court to control or revise.”—*Humes v. O'Bryan*, 74 Ala. 64, 78; *Campbell v. White*, 77 Ala. 397. Later it was said that “the continuance of a case is within the discretion of the trial court, and the exercise of this discretion will not be reviewed on appeal, except in a case where it is shown that the court has abused the discretion vested in it.”—*Spann v. Torbert*, 130 Ala. 541, 30 South. 389. Still later it has been declared that the action of the trial court will not be revised on appeal unless a *gross abuse* of the discretion is shown.—*Kelly v. State*, 160 Ala. 48, 49 South. 535. It seems, however, that in criminal cases the constitutional right of the defendant to have compulsory process for his witnesses may sometimes be so involved in the question as to nullify the general rule as to discretion.—*Rodgers v. State*, 144 Ala. 32, 40 South. 572.

In the present case the suit was filed on March 22, 1909, and a demurrer was filed to the complaint on April 27, 1909. On October 20, 1909, and again on February 21, 1910, the cause was continued at the instance of defendant on account of his sickness. On June 2, 1910, defendant again moved for a continuance, show-

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ing to the court in support thereof, as recited by the docket entry, "that the cause of action as set forth in the complaint had arisen after the sickness of the plaintiff (?) had begun, and that the plaintiff (?) had been in danger of death since the said sickness had begun, and at times very much better." Substituting "defendant" for "plaintiff" in this entry—as was evidently intended—it does not appear that defendant was physically or mentally unable to appear in court for trial on the date mentioned. Thereupon the court entered an order continuing the cause on account of defendant's sickness, and upon his paying all accrued costs within 30 days, for which execution was to be issued. The bill of exceptions recites that defendant "then and there in open court excepted to the said action of the said court, and the said judgment of the said court, in taxing them with the cost of the said cause as set forth in said motion (?)."

On June 24, 1910, defendant filed a motion to set aside "that part of the order of this court taxing him with the cost of said cause" on the ground, primarily, that he was sick and unable to attend court. Several other grounds are stated, but they do not merit mention or consideration. In support of this motion the testimony of defendant's attending physician was offered, and it seems to establish the fact of defendant's physical and mental unfitness to take part in the trial of his case—at least there was no testimony offered to the contrary. This motion was heard and overruled on June 29, 1910, to which defendant duly excepted. The transcript shows that this appeal is taken from the judgment for costs rendered June 2, 1910, and also from the judgment of June 30 (29?), 1910.

As has already been noted, the showing made for a continuance on June 2nd was wholly insufficient; and,

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such being the case, no error could possibly have been predicated on an absolute denial of that motion. Exercising its lawful discretion, however, the motion was granted on condition that defendant should pay the costs already accrued.—*Torrey v. Bishop*, 104 Ala. 548, 16 South. 422. By a seasonable objection, defendant might have rejected the continuance on such terms, and complained of the refusal to grant a continuance, if he so desired. But the effect of his exception was to accept the continuance, with a rejection only of the *terms* imposed. This was held not permissible in *Humes v. O'Bryan*, 74 Ala. 64, 78, where it was said: “The enjoyment of the benefit of the order as made was an acceptance of the condition with which the court saw fit to burden it. The two should have been accepted or rejected as an entirety, and this course does not seem to have been followed.”

The imposition of costs as a condition to granting the continuance being within the unrevisable discretion of the trial court, it follows that no appeal lies from the order and judgment of the court in that behalf, and the appeal must therefore be dismissed.

Appeal dismissed. All the Justices concur.

Draper v. State, *ex rel. Patillo.*

Quo Warranto.

(Decided December 22, 1911. Rehearing denied February 17, 1912.
57 South. 772.)

Municipal Corporation; Appointment; Officers; Acts Constituting.—Appointment by the governor of a commissioner for a city is not an appointment to a state office within the provisions of section 1474, Code 1907, and hence, does not require a commission. The facts stated and held to constitute a complete appointment

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without a commission, and that the governor could not thereafter cancel the appointment.

(Simpson and Anderson, JJ., dissenting.)

APPEAL from Morgan Law and Equity Court.

Heard before Hon. THOMAS W. WERT.

Quo warranto by the State, on the relation of Pierce Patillo, against James L. Draper, to determine the right to the office of City Commissioner of Hartselle, Ala. There was a decree for relator, and defendant appeals. Affirmed.

It is made to appear from the application: That petitioner was an applicant for the office of commissioner of Hartselle, and that on the 23d day of August, 1911, the Governor of the state caused to be addressed to relator a letter or printed communication advising him of his appointment as commissioner for a term of three years. This letter is made an exhibit. Relator then qualified by filing his bond and oath of office with the judge of probate of Morgan county as required by law, and the judge of probate thereupon officially advised the Governor of the appointment and the fact that petitioner had qualified. That the Governor, on receipt of this communication, indorsed or caused to be indorsed on the back of said communication the following: "Send Com. to P. Patillo, Hartselle, Ala."—and caused said official communication with indorsement thereon, to be placed in an official wrapper in the office of said Governor, which official wrapper bore the following indorsement: "Authorized or indorsed thereon by the Governor as follows: Morgan County. Application of P. Patillo; P. O., Hartselle. For appointment to office of city commissioner for three years' term. Precinct _____. Appointed 8/23/1911. By order of the Governor: John D. McNeil, Private Secretary. Notified _____. Qualified 8/26/1911. Fee paid 8/26/11." That

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an attempted cancellation has been made of the date of qualification and the date of payment of fee by lines drawn through said date. It is further alleged that there is a record kept in the office of the Governor, known as the record of the recording secretary, in which is entered the names and other data of executive appointments of the Governor, and that on said record appears and did appear the following, made and entered prior to September 9, 1911: "Morgan County Executive Appointments. Name, Patillo, P.; address, Hartselle; office, commissioner; date appointed, 8/23/11; remarks, three-year term." Here follow similar entries as to other commissioners. And relator shows that across the face of such entries have been drawn pencil marks, and across the face thereof has been written the legend "Canceled," by whom relator is not informed or advised. The other parts of the petition set up the pretended appointment of those who assumed to be acting as commissioners, made some time after the matters above set forth, and show that the town of Hartselle, some time before any appointments were made, had in the proper manner elected to have a commission form of government and that the same belonged to class D of cities in Alabama. Petition further sets out the acts and doings of those alleged to have usurped the office, etc.

TIDWELL & SAMPLE, for appellant. The office to which the relator seeks to have himself restored is a state office and a commission is the only legal evidence of title. —*People v. Lynch*, 21 Am. Rep. 692; *Dillon on Mun. Corp.* sec. 97; *Montgomery v. The State*, 107 Ala. 372; *People v. Hurlburt*, 24 Mich. 83; *State v. Curley*, 5 Colo. 419; *State v. Sayre*, 118 Ala. 31; *State v. Detroit*, 37 L. R. A. 219; 30 Gratt. 34; 3rd South. 82; 20 L. R. A. (N.

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S.) 1128; Sec. 1474, Code 1907. Under the evidence relator was not appointed.—Acts 1911, p. 593; 10 Enc. of Evid. 722 and note; *Coggin v. Myrick*, 31 South. 22; 34 Cyc. 585; 6 Cal. 674; Jones on Evid. 645. No appointment can be valid except an appointment in writing.—70 N. Y. 521; 38 Pac. 68; Meechum on Public Offices, sec. 115; 25 Pac. 684; 27 L. R. A. 45; 10 South. 125; 2 McQuillan Mun. Corp. sec. 463; 23 A. & E. Enc. of Law, 344; *Thompson v. The State*, 21 Ala. 48.

E. W. GODBEY, for appellee. Section 1474 has no application as the officer appointed was not a state officer.—*Ex parte Wiley*, 54 Ala. 226; *State ex rel. Burns*, 21 South. 290; *Buckner v. Gordon*, 81 Ky. 665; *State ex rel. Churchmen*, 51 Atl. 49; *Hayes v. Henry*, 62 Cal. 557; 36 Cyc. 853; 14 L. R. A. 646; 62 Mo. 370; *Johnson v. The State*, 31 South. 493; 120 S. W. 29. The language used was sufficient to constitute an appointment.—68 N. Y. 514; 29 Cyc. 1371; 146 U. S. 36; 51 Atl. 457; *Hill v. State*, 1 Ala. 559. No commission was necessary.—Section 5, Acts 1911, p. 594. The appointment was recorded.—164 U. S. 100; 10 Enc. of Evid. 716; 45 Am. Dec. 621; *Jordan v. McClure L. Co.*, 54 South. 415. There was no vacancy after the appointment, and hence, there was no power in the Governor to make another appointment.—18 Wend. 515; 9 Paige Ch. 507; 21 L. R. A. 539; 22 L. R. A. 754. It was not necessary that the appointment should be made in writing, although it was so made.—12 Grat. 303; 29 Cyc. 1373; 12 Mo. 199; 19 Am. Rep. 58; 12 Mod. 200; 2 La. Ann. 663; 22 Atl. 686; 9 Abbott 456.

ANDERSON, J.—While there appears to be some conflict in the authorities as to what constitutes an appointment to office, the definition of "what constitutes

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appointment," and to which we adhere, is: Where the power of appointment is absolute, and the appointee has been determined upon, no further consent or approval is necessary, and the formal evidence of the appointment, the commission, may issue at once. Where, however, the assent or confirmation of some other officer or body is required, the commission can issue or the appointment be complete only when such assent or confirmation is obtained.—*People v. Bissell*, 49 Cal. 407. In either case the appointment becomes complete when the last act required of the appointing power is performed.—*State v. Barbour*, 53 Conn. 76, 22 Atl. 686, 55 Am. Rep. 65. In cases where a commission is required, the appointment is complete when the commission is signed by the executive, and sealed if necessary, and is ready to be delivered or transmitted to the appointee.—Meechem on Public Officers, § 114. There seems to be a distinction as to when the appointment becomes complete, in cases where the commission is to be signed by the appointing power and when signed and issued by another. If the commission is to be signed by the appointing power, the issuance of same is essential to a completion of the appointment.—*Conger v. Gilmer*, 32 Cal. 75. If, however, such formal act is to be performed by some one other than the appointing power, it constitutes no part of the appointing power. Section 1470 of the Code of 1907 requires commissions to offices to be signed by the Governor and countersigned by the Secretary of State, unless it be the commission to the Secretary of State, which must be signed by the Governor alone. Section 1469 provides what officers must have commissions, and does not include city commissioners or other officers not mentioned; but section 1474, in providing for filling vacancies in *all* state offices, requires that the appointee must be commissioned.

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Therefore there is a field of operation for both statutes; section 1469 requiring commissions for all offices therein named, whether elected or appointed, and section 1474 requiring a commission to all offices appointed by the Governor to fill vacancies, whether among the officers named in section 1469 or not. Indeed, it seems to be the policy of our legislative system that a commission is essential to the exercise of the duties of a commissioned officer, as section 7447 of the Code makes it an offense for an officer required to have a commission to exercise the duties of the office without first having obtained the commission. This is an old section of the Code, and was amended, by implication, by new section 1472 of the Code, in so far as it might apply to elective officers who had provided themselves with a legal certificate of their election. As to all others, it is still in force, and indicates that all appointments should be made by the issuance of a commission, and which is essential to the exercise of the duties of the office. "The power to appoint to fill vacancies may exist in two classes of cases: (1) Vacancies in offices originally filled by appointment; and (2) vacancies in offices originally filled by election. A vacancy exists when there is no person lawfully authorized to assume and exercise at present the duties of the office."—Meechem on Public Officers, § 125. Mr. Meechem also says, in speaking of a newly created office, in section 132 of his work: "Whether a newly created office, which has never had an incumbent, and which no one is now legally authorized and qualified to assume, can be deemed vacant, so as to authorize an appointment to fill it, is a question upon which the authorities are not in harmony; but the weight of authority seems to be that it is to be deemed vacant." Thus it is said in Indiana: "There is no technical or peculiar meaning to the word 'vacant,' as used

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in the Constitution. It means empty, unoccupied; as applied to an office, without an incumbent. There is no basis for the distinction urged that it applies only to offices vacated by death, resignation, or otherwise. An existing office, without an incumbent, is vacant, whether it be a new or an old one. A new house is as vacant as one tenanted for years which was abandoned yesterday. We must take the words in their plain usual sense."—*Stocking v. State*, 7 Ind. 326; *State v. Irvin*, 5 Nev. 111; *People v. Mott*, 3 Cal. 502; *Rhodes v. Hampton*, 101 N. C. 629, 8 S. E. 219.

We now come to the last and most serious question in the case: Are the commissioners of the city or town of Hartselle state officers within the meaning of section 1474 of the Code of 1907? Judge Dillon, in his great work on Municipal Corporations, in drawing a distinction between state and municipal officers (volume 1 [5th Ed.] § 97), says: "Questions have arisen *under special constitutional provisions* respecting the authority of the Legislature over *municipal offices and officers*. And here it is important to bear in mind the before-mentioned distinction between *state officers*—that is, officers whose duties concern the state at large, or the general public, although exercised within defined territorial limits—and *municipal officers*, whose functions relate exclusively to local concerns of the particular municipality. The administration of justice, the preservation of the public peace, and the like, although confided to local agencies, are essentially matters of public concern; while the enforcement of municipal by-laws proper, the establishment of local gasworks, of local waterworks, the construction of local sewers, and the like, are matters which ordinarily pertain to the municipality, as distinguished from the state at large." This section was approved and quoted in the opinion of

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our own court in the case of *Montgomery v. State*, 107 Ala. 372, 18 South. 157. Said Campbell, C. J., in the case of *People v. Hurlbut*, 24 Mich. 83, 9 Am. Rep. 103: "The preservation of the peace has always been regarded, both in England and in America, as one of the most important prerogatives of the state. It is not the peace of the city or county, but the peace of the king or state, that is violated by crimes and disorders. The prosecution is on behalf of the state. The trial is before tribunals created and regulated by the state. The remission of punishment is by the Governor of the state."

Acts 1911, p. 591, providing for a commission form of government in cities having a population of from 1,000 to 25,000 inhabitants, gives the commission authority and jurisdiction to preserve the peace and to enforce certain state statutes, as well as the by-laws and ordinances of the municipality. They shall have power to exercise the authority and jurisdiction, executive, legislative, and judicial as was exercised by the then existing mayor, aldermen and board of police commissioners, and all other boards except the boards of education, See section 6 of the act. Article 14 of the municipal law (page 596, vol. 1, Code of 1907), in providing for the enforcement of the law and the administration of justice, defines a "recorder" to be any person authorized therein to hold municipal court, and in the absence of any such recorder authorizes any councilman to preside over the court, and gives him the same power and authority therein granted to recorders. Section 1215, in defining the jurisdiction of recorders, also gives to the office the powers of an ex officio justice of the peace, except in civil matters, and also provides that in certain instances any councilman may act as recorder, with his full power and authority. The commissioners being state officers, to be first appointed by the Governor un-

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der the terms of the act, the manner of making said appointments was governed by section 1474 of the Code of 1907, and which requires that all appointees to fill vacancies must be commissioned, and the issuance of which, we think, was essential to a complete appointment. In the case of *Ex parte Wiley*, 54 Ala. 226, the court did not hold that a county solicitor was not a state officer in the general acceptation of the term, but simply held that there was a broad distinction between officers properly termed state officers and those termed county officers, and that a county solicitor was not a state officer, as used and contemplated in section 23 of article 4 of the Constitution of 1868, relating to the impeachment of state officers. It was not held or intimated that a county solicitor was not a state officer in the general acceptation of the term. The same writer subsequently said, in the case of *Winter v. Sayre*, 118 Ala. 31, 24 South. 94: "The Constitution and the Legislature create two classes of public offices and officers—offices and officers of the state, and county offices and officers." Of course, there is a distinction between the two classes; but neither of these cases hold that county officers are not state officers also, or that a county officer is to no intent and purpose a state officer. Says Judge BRICKELL: "Every public officer, judicial, ministerial, or executive, deriving place and authority from the Constitution and laws is an officer of this state, and not of any other sovereignty or jurisdiction. If the mere abstract force of words be consulted, the intendant or mayor * * * may be said to be 'judges of this state.'"

Thus it would seem that these commissioners are state officers, under the broad and general use of the words, notwithstanding there may be a marked distinction between them and what are termed state and coun-

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ty officers in their strict or proper use in a Constitution or law which deals separately and distinctly with state and county officers. On the other hand, it has been the legislative policy to require a commission as a condition precedent to the appointment by the Governor in filling all vacancies. The words "state and county officers," as used in section 1474, are intended to include all vacancies to state and county offices as used in a broad and general sense, and should not be confined to state and county officers in the restrictive sense, or to those officers as set out in section 1469 of the Code. Otherwise, section 1474 will read very differently from what it says, and would say all offices required to have a commission, or all officers mentioned in section 1469, instead of requiring that "all appointees must be commissioned," thus intending that a commission must issue as a condition precedent to the appointment to fill a vacancy. Nor is it reasonable to say that the statute requires a commission in some instances and not in others, for section 1474 contemplates that every appointment to be made by the Governor shall be completed by the issuance of a commission.

It may be conceded, however, for present purposes, that the office in question is strictly a municipal one, and not a state or county one, within the provision of section 1474 of the Code, yet it was made appointive at the outset, and while the act is silent as to how the Governor shall make the appointment, and does not in express terms require a commission, it must be concluded that the Legislature contemplated that the appointment should be made in the then existing form and manner, and under the terms of the law then existing and referable to appointments to be made by the Governor. In other words, until a recent date when officers of this character were made appointive by the Governor, he

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supplied vacancies by appointment only, and almost, if not entirely, to state and county offices, and which said appointments were completed by the issuance of a commission as required by the statute; and it must be assumed that the Legislature intended and contemplated, in the present act, that the authority to appoint would be exercised under existing rules and regulations. It was well known when this act was passed that appointments by the Governor to fill vacancies could be completed only by the issuance of a commission, and the Legislature must have intended that these new appointments should be made in the same manner. When words which have a known meaning and significance are used in a statute, it must be presumed that the Legislature used or adopted them in their well-known meaning and sense; the contrary not appearing. The Legislature used the word "appoint," meaning that the vacancies would be filled in the same manner and with the same formality as then existing for appointing to vacancies; otherwise, they would have doubtless said the Governor should name the first commissioners, instead of "appoint." I do not think that the attempted appointment of the relator was complete, and that it was in fieri until the signing of a commission by the Governor, and it is my opinion that the respondent, who holds under a commission, is entitled to the office.

A majority of the court are of the opinion that the vacancy in question was not of a state office, and was not one which required a commission in order to complete the appointment to fill same—that the relator was legally and duly appointed, and which said appointment was beyond the control of the Governor. The case must therefore be affirmed.

Affirmed.

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MCCLELLAN, MAYFIELD, SAYRE, and SOMERVILLE, JJ., concur. SIMPSON and ANDERSON, JJ., dissent. DOWDELL, C. J., not sitting.

SIMPSON, J.—I concur in the result of the opinion of Justice ANDERSON. I do not think that the office in question is a state office; but I concur in what is said by ANDERSON, J., as to the presumption arising from the laws in existence as to how gubernatorial appointments are made. There is reason in the remark of the Supreme Court of Indiana “that it is probably the law that, while title to an office is solely derived from executive appointment, the commission of the executive is the only legal evidence of such title.”—*State v. Allen*, 21 Ind. 516, 83 Am. Dec. 370. I think that, at least, it may be said, whether a formal commission be required or not, there must be some distinct pronouncement by the Governor that the appointment is made. The direction by the Governor to the clerks in his office cannot amount to more than a direction about what *is to be done*, and, in the very nature of things, the matter must remain in fieri until the final declaration of the appointment is made, and, until that is done, be subject to recall by the Governor. The private secretary is the mouthpiece of the Governor, and not the recording secretary. If a commission is not necessary, and the private secretary, under the direction of the Governor, addresses a communication to the appointee, informing him of his appointment, that may be considered the final act; but in this case the evidence shows that the communication was not signed by the private secretary, but his name was signed by the recording secretary, without authority. It results that it was within the power of the executive to “hold up” the instructions previously given and make a new appointment.

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Lowery *v.* Petree.

Election Contest.

(Decided February 18, 1912. 57 South. 818.)

1. *Appeal and Error; Dismissal; Grounds.*—Where the transcript was filed during the term to which it was by law returnable, it will not be dismissed because not filed in time, in the absence of a motion to that end.

2. *Election; Contest; Bond; Amendment.*—Although the bond was insufficient under section 470, Code 1907, and the petition was properly dismissed therefor, it was error to refuse to set aside such order where the petitioner immediately offered to perfect the security.

APPEAL from Franklin Circuit Court.

Heard before Hon. C. P. ALMON.

Election contest by William J. Lowery against Sidney J. Petree for the office of judge of probate. From a judgment dismissing the petition, because of failure to give statutory bond, contestant appeals. Reversed and remanded.

The bond was as follows: "We, William J. Lowery [here follows list of sureties], hereby agrees to pay to the person legally entitled to same all of the costs of the afore-styled cause, wherein William D. Lowery is contestant and Sidney J. Petree is contestee, provided such Sidney J. Petree be successful in said contest."

WILLIAMS & JONES, B. H. SARGEANT, R. T. SIMPSON, JR., W. H. KEY, and A. H. CARMICHAEL, for appellant. The bond was sufficient under the law.—Sections 462, 470 and 475, Code 1907. If not sufficient the bond was amendable, and the court should have set aside the order dismissing the appeal upon the immediate offer of petitioner to give perfect security.—*Morgan's case*, 30 Ala. 51; *Peary v. Burkett*, 35 Ala. 141; *Wilson v. Duncan*, 114 Ala. 659; *Ex parte Shepherd*, 55 South. 627.

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CHENAULT & CHENAULT, for appellee. The appeal should be dismissed.—Sects. 2849, 2870 and 5957, Code 1907; *Schulman v. Brantley*, 48 Ala. 193. The bond was not sufficient.—Sec. 470, Code 1907; *Hilliard v. Brown*, 103 Ala. 318; *Wilson v. Duncan*, 114 Ala. 669. The filing of the security for costs within the time named in the statute is jurisdictional, and the court could not proceed without it, and therefore, properly dismissed the petition.—*Wilson v. Duncan, supra*; *Black v. Pate*, 130 Ala. 514; *Pearce v. Anderson*, 162 Ala. 65. The case was dismissed before offer to file said security, and there was no case on which to base a security for cost.—*Turner v. Moblie*, 135 Ala. 130.

MCCLELLAN, J.—There is no motion to dismiss the appeal. The transcript was filed, though belated, during the term to which, in term time, it was by law returnable. In the absence of a motion to dismiss the appeal, we will not, *under these circumstances*, consider its dismissal.

The paper, purporting to be a bond, filed with the statement of contest, did not comply with the requirement of the statute in that particular.—Code 1907, § 470. It should have been conditioned to secure the costs of the contest. Obviously, an attempt, though abortive, was made to comply with the statute as to security for costs. In such case the bond, if defective as a statutory obligation, was amendable.—*Wilson v. Duncan*, 114 Ala. 659, 21 South. 1017. The doctrine, in this particular, of that decision, was reiterated in *Ex parte Shephard*, 172 Ala. 205, 55 South. 627. The court, therefore, erred in declining to set aside its order of dismissal upon the immediate (thereupon) offer of contestant to perfect the security for costs of contest, to

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conform it to the requirement of the statute (section 470) therefor.

The judgment of dismissal is reversed, and the cause is remanded.

Reversed and remanded. All the Justices concur.

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Quo Warranto.

(Decided December 21, 1911. Rehearing denied February 17, 1912.
57 South. 870.)

1. *Judges; Qualifications.*—Construing section 154, Constitution 1901, in the light of conditions existing at the time of its adoption, and the judicial history of the state as evidenced by prior Constitutions and the Acts of the Legislature, it is held that said section 154 did not inhibit the legislature from requiring judges of probate courts to act as judges of the county court, even though such court was a court of record and such judges were not learned in the law, since section 139, Constitution 1901, impliedly authorizes the legislature to impose on probate judges and other persons the duties and functions of inferior courts.

2. *Same; State Court; Probate Court.*—Section 280, Constitution 1901, does not prohibit the legislature from investing probate judges with the powers and duties of judges of the county court, for section 139 of such Constitution mentions such persons as may be, by law, invested with the powers of a judicial nature, including judges of probate.

3. *Constitutional Law; Statutes; Presumption.*—The Acts of the Legislature are presumed to be constitutional until clearly shown to be unconstitutional.

4. *Same; Determination.*—A statute will not be declared unconstitutional unless shown to be so beyond a reasonable doubt, and this is especially true where many similar acts have been sustained.

5. *Appeal and Error; Review; Presentation in the Court Below.*—Where information in the nature of quo warranto was to test the right of the probate judge to exercise the duties of a county judge and alleged that there was a county court, that it was a court of record and that the probate judge was ineligible to discharge the functions of that office, and the information was dismissed upon the sustaining of a demurrer thereto, the sufficiency of the information was the only question presented for review; the question of the constitutionality of the Local Act creating the county court could not be reviewed, as it was not raised in the court below, and could not be raised on appeal.

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APPEAL from Cullman Circuit Court.

Heard before Hon. D. W. SPEAKE.

Information by the State on the relation of W. T. Vandiver in the nature of quo warranto directed against R. I. Burke as judge of the county court. From judgment sustaining demurrer to the information relator appeals. Affirmed.

J. B. BROWN, and CALLAHAN & HARRIS, for appellant.
The pivotal point in this case is of course the status of the county court of Cullman county, for if it is a court of record, then section 154, Constitution 1901, applies. The county court is a court of record.—*Ex parte State v. Merlett*, 71 Ala. 371; *Ex parte Roundtree*, 51 Ala. 42; *Larkin v. Simmons*, 155 Ala. 274; *Cofer v. State*, 168 Ala. 172; *In re Deane*, 13 L. R. A. 229; *Ex parte Thistleton*, 52 Cal. 220; *Beech v. Woolford*, 7 Ind. 351; *Woodman v. Somersett Co.*, 37 Me. 29; *Shroyer v. Richmond*, 16 Ohio St. 455; *Wheaton v. Fellows*, 23 Wend. 375; *Bailey v. Ala.*, 219 U. S. 219; *People v. McGowan*, 77 Ill. 644; *Connor's Case*, 39 Cal. 98. The adoption of the Constitution of 1901 repealed the provision of the act creating the Cullman County Court in so far as the judge of probate was made ex officio judge of such court, and left the court without a judge. There was no doubt of the authority of petitioner to bring the suit in the name of the state without the authority of the Attorney General.—Sects. 5451, 5453 and 5459, Code 1907; *Montgomery v. State*, 107 Ala. 372. The petition was sufficient as against demurrs.—*Hamm v. The State*, 156 Ala. 651; *Frost v. State*, 153 Ala. 654; *Jackson v. State*, 143 Ala. 145. The burden was on the person holding the office to show his right and title to the office.—*Montgomery v. State*, *supra*. The demurrer confesses the truth of the allegation that the present holder is not

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learned in the law, and he is therefore ineligible to hold it.—*Clements v. The State*, 153 Ala. 654; *Jamison v. Wiggins*, 46 L. R. A. 318. Counsel discuss the constitutionality of the act creating the County Court of Cullman County, but in view of what is said in the opinion, it is not deemed necessary to here set it out.

GEORGE H. PARKER, and JOHN C. EYSTER, for appellee. Probate courts are courts of record.—*Dozier v. Joyce*, 8 Port. 303; *Lee v. Hamilton*, 3 Ala. 533; Sec. 5353, Code 1907, Sec. 154, Constitution 1901. In common law the county court was a court incident to the jurisdiction of the sheriff, and was not a court of record.—3 Blacks. 35. It is not a court of record under our Constitution.—Sec. 150, Constitution 1901. The judicial power was lodged in the court and not in the magistrate.—*Perkins v. Corbin*, 45 Ala. 103. The Attorney General is alone authorized to institute this suit.—Sec. 36, Code 1907; *State ex rel. Burke*, 160 Ala. 163; *Ex parte Stevenson*, 113 Ala. 85; *Ex parte State*, 71 Ala. 362. On the question of the act of the de facto judge being legal, see *Ex parte State ex rel. Attorney General*, 142 Ala. 87. As to what is meant by learned in the law, see *O'Neal v. McKenna*, 116 Ala. 620. Impeachment is the remedy and not quo warranto.—*State v. Gardner*, 43 Ala. 234.

MAYFIELD, J.—This is a statutory information, in the nature of quo warranto, brought in the name of the state, on the relation of W. T. Vandiver, against R. I. Burke, to inquire into the right and title by which the latter holds or exercises the office and functions of judge of the county court of Cullman. The proceeding is expressly authorized by chapter 128, § 5453 et seq., of the Code of 1907.

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The material allegation, together with the prayer of the information, is as follows: "That R. I. Burke, who is not 'learned in the law' as required by section 154 of the Constitution of Alabama, is holding and exercising the powers and functions, and receiving the emoluments of the office of judge of the county court of Cullman county, and plaintiffs aver that the said R. I. Burke usurps, intrudes into, and unlawfully holds or exercises the powers and functions of said office. The plaintiffs therefore pray that summons issue as required by law, directed to the said R. I. Burke, commanding him to appear before the honorable, the circuit court of Cullman county, and to show cause by what right, warrant, or authority he is holding and exercising the functions and powers of said office of judge of the county court of Cullman county."

The respondent first appeared specially, and moved the court to quash the information and proceedings, on the grounds that they were not instituted by the Attorney General, but on the relation of one W. T. Vandiver, who was without authority to institute the same, which motion was heard, and overruled, by the judge to whom it was addressed. Respondent also demurred to the information, assigning the same grounds set forth in his motion to quash, and additional grounds, among which were the following: "Because the allegation therein that defendant 'usurps, intrudes into, and unlawfully holds or exercises the powers and functions of said office,' is a conclusion of the pleader, and not a statement of facts. Because the judge of probate of Cullman county is made the judge of said court, and said petition does not allege that the defendant is not judge of the probate court of Cullman county. Because this court judicially knows that this defendant, R. I. Burke, is judge of probate of Cullman county, and that

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judges of the probate court were expressly exempted and excepted from the qualifications prescribed by section 154 of the Constitution that judges 'shall be learned in the law.' Said petition does not show that this defendant is holding and exercising the powers and functions and receiving emoluments of the office of judge of the county court of Cullman county, otherwise than as a duty devolving upon him by virtue of his occupancy of and holding the office of judge of probate of Cullman county. Said petition does not aver that said Robert I. Burke is not the judge of probate of Cullman county. Because the functions and powers exercised by the judge of the county court of Cullman county is not an independent jurisdiction, but attaches to and is a part of the duty devolving upon the judge of probate, who is excepted and exempted by section 154 of the Constitution. Because said county court of Cullman county was existing and the duties of the judge performed by the judge of probate at the time of the adoption of the Constitution, and the adoption of the Constitution was a recognition of the right of the probate judge to exercise the powers and functions as presiding officer of the county court, and the judge of probate or judge of probate court was excepted and exempted from the provisions of said section 154."

The judge to whom the information was addressed sustained the respondent's demurrer, and the relator declined to plead further, and suffered final judgment; and from such judgment the relator prosecutes this appeal.

The proceeding in question, in the name of the relator, is expressly authorized by the statutes and Code procedure to which we have above referred; and the appeal to this court is likewise authorized by sections 5470 et seq. of the Code. It is distinguishable from that of

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mandamus to a judge to control his judicial action, which was considered and decided in the cases of *State ex rel. Almon v. Burke*, 160 Ala. 163, 48 South. 1035, and *In re Stephenson*, 113 Ala. 85, 21 South. 210. In this case the proceeding is in the nature of quo warranto, and is by statute explicitly authorized to be instituted, in the name of the state, on the relation of "any person giving security for costs," whereas there is no such authorization as to mandamus proceedings against a judge. So the important and material question presented by the information and the demurrer thereto was, Can the respondent, who is probate judge of Cullman county, and is "not learned in the law," constitutionally exercise or discharge the judicial functions imposed, or attempted to be imposed, by statute, upon probate judges, as to the county court of Cullman?

It is contended by the relator that the county court of Cullman is "a court of record" within the meaning of section 154 of the Constitution, and that respondent cannot therefore constitutionally exercise, perform, or discharge the duties of such office. On the other hand, the contention of the respondent probate judge is set forth in his special grounds of demurrer. Section 154 of the Constitution of Alabama of 1901 reads as follows: "Chancellors and judges of all courts of record, shall have been citizens of the United States and of this state for five years next preceding their election or appointment, and shall be not less than twenty-five years of age, and, except judges of probate courts, shall be learned in the law." The correspondent section of the Constitution of 1875 reads as follows: "Sec. 14. The judges of the Supreme Court, circuit courts, and chancellors and the judges of city courts shall have been citizens of the United States and of this state for

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five years next preceding their election or appointment, and shall be not less than twenty-five years of age, and learned in the law." Under this constitutional provision, as it was written in the Constitution of 1875, it was certain—beyond doubt—that it was not a constitutional requisite that the judge of a county court or the person exercising the powers and discharging the functions conferred upon such courts, whether a probate judge or not, should be learned in the law. Did the Constitution of 1901 work such a change as to require the officer or person discharging such functions to be "learned in the law," if such county court be, or is made, a "court of record," and the officer or person discharging such functions be the probate judge of such county? This is the serious, the important, question propounded to the circuit judge below, and to us by this appeal.

Section 139 of the Constitution which names or prescribes the tribunals in which the judicial power of the state shall be vested names the Senate sitting as a court of impeachment, the Supreme Court, and circuit, chancery, probate, and such inferior courts as the Legislature may establish; and concludes by adding the phrase, "*and such persons as may be by law invested with powers of a judicial nature,*" with certain conditions as to the establishment of such *inferior* courts, not here important to be discussed. The quoted and italicized provision of section 139 of the Constitution first appeared in the Constitution of 1875. Since the Constitution of 1875, the Legislature has had this express authority for conferring certain parts of the judicial power of the state—theretofore conferred or conferable only upon the tribunals or courts mentioned or provided for in the previous Constitutions of 1819, 1861, and 1865—upon certain designated persons. This

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change of the Constitution was no doubt suggested, and rendered proper and appropriate, if not necessary, by the first penal Code of the state, which was adopted by the Legislature in the year 1866. As is well known, this Code provided for a new system of criminal procedure in this state. Such was the undoubted purpose of the act providing for the codification, and also of the act subsequently adopting the Penal Code. See Penal Code 1866.

In the case of *Balkum v. State*, 40 Ala. 671, 675, this court spoke as follows: . "A constitutional question is presented in this case, viz., that the Legislature had not the power to establish a county court in the several counties in this state, and make the judges of probate ex officio judges of said courts, and that the county courts thus established, being independent courts of inferior jurisdiction, can be presided over by none other than separate judges elected for that purpose. This question has been in effect decided at the present term of this court. A county court of different powers and jurisdiction from the county courts as now existing was established by the Legislature for the county of Montgomery on the 24th of February, 1860; and the judge of probate in said county was made ex officio the judge of said county court. Acts 1859-60, p. 564. On appeal to this court from a judgment rendered by the said county court, the question raised in the present case was presented, and we then held as follows: 'No one questions the power of the General Assembly to establish by law inferior courts with common-law jurisdiction within a county, city, or district, and, should it do so, we see no good reason why the Legislature cannot authorize any judicial officer who has been elected by the people to preside in such inferior court, if such officer has been elected by the people under the

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jurisdiction of the court thus established.'—*Randolph v. Baldwin*, 41 Ala. 305, 309." In the case of *Gaines v. Harrin*, 19 Ala. 498, this court said: "To hold all such acts as are performed by inferior officers void, because such officers have not been commissioned or qualified as the Constitution requires judges to be elected and qualified, would be to unsettle the titles of the country, and to introduce a scene of confusion which would greatly disturb the public repose." This announces a doctrine stronger than is required to sustain the validity of these judgments."

In the case of *Ex parte Roundtree and Orr*, 51 Ala. 42, the constitutional question as to the qualification of the judge of the circuit court ex officio to discharge the duties of the inferior court created by the Legislature for Morgan county was different from the question in this case, and from the questions involved in the two cases last above quoted from. In the *Roundtree Case* the question was that the Constitution required that all judges should be elected by the people, and that the judge provided was not elected by the people of Morgan county, but by the people of the then Fourth judicial circuit, and that this was not a compliance with the Constitution notwithstanding Morgan county was a part of the Fourth judicial circuit. That part of the act providing that the judge of the Fourth Circuit should be the judge of the inferior court created was declared void. That case was distinguished from the other cases, and therefore from this, by BRICKELL, C. J., as follows: "The decisions in the cases of *Balkum v. State*, 40 Ala. 671, and *Randolph v. Baldwin*, 41 Ala. 305, are not inconsistent with, but support, the views we have expressed. The courts, the jurisdiction of which was involved in those cases, were presided over by a judge deriving his title from an election

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by the qualified voters only of the districts for which the courts were established. It is apparent, if such had not been the fact, the jurisdiction of the courts would not have been maintained."

In speaking of the power of the Legislature to establish inferior courts, and of the effect and result of the Constitution being subsequently adopted with such provisions as to inferior courts, this court in *Roundtree's Case*, above, at pages 47, 48, of 51 Ala., said: "The question was the subject of deliberate consideration in *Nugent v. State*, 18 Ala. 521, and it was declared that a court, the judgments of which were subject to revision by a higher tribunal, was an inferior court within the meaning of this clause of the Constitution, and that it is the relation the courts bears to the superior tribunal, and not the character or extent of its jurisdiction, which is contemplated. The conclusiveness of this decision has never been questioned. It has been repeatedly acted on by the General Assembly, and acquiesced in by this court. With full knowledge of it, the same provision in the same terms was incorporated in the same Constitution. We are not at liberty therefore, to depart from it, and must pronounce it within legislative competency to ordain and establish an inferior court, clothed with the jurisdiction the statute confers on this court."

It is a well-settled canon of construction that Constitutions should be construed in the light of the conditions existing at the time of their adoption, and of the judicial history of the state. In the light of the long established usage and practice of probate judges to perform the duties pertaining to the county courts, and of the long continued and almost unvarying practice of the Legislature to confer such duties upon the probate judges, we cannot believe that it was the intention of

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the Constitution makers to inhibit the continuance of the practice, particularly as no provisions were made, for abolishing such courts, or designating other persons or officers to discharge the duties and functions thereof.

"In pronouncing on the constitutionality of an act which has received the sanction of a co-ordinate department of the government—the legislative department—the courts will indulge the presumption that such act is constitutional until clearly convinced to the contrary.—*Zeigler v. S. & N. R. R. Co.*, 58 Ala. 594; *S. & N. R. R. Co. v. Morris*, 65 Ala. 193; *Edwards v. Williamson*, 70 Ala. 145." 2 Mayf. Dig. p. 690.

It is another sound rule of construction that when called upon to pronounce the invalidity of an act of the Legislature, passed with all the forms and solemnities requisite to give it the force of law—and especially as in this case, where like acts or acts of similar kind have been repeatedly so passed by successive Legislatures—courts approach the question with very great caution, and examine it in every possible aspect, and ponder it as long as deliberation and patient attention can throw any new light on the subject, and will never declare such statutes void unless the invalidity is considered beyond reasonable doubt.

Applying these principles to the case at bar, we are constrained to hold that it was not the intention of the makers of the Constitution to render probate judges ineligible to perform the functions or discharge the duties imposed on them by the Code or by special statutes as to county courts unless they were learned in the law. The Constitution expressly excepts probate judges from the requirement of being learned in the law. It was, of course, known to the Constitution makers at the time of the framing and adoption of the Constitution of 1901 that in many of the counties the functions and

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duties of the county court were being performed and discharged by the probate judge, and that in most cases they were not learned in the law. There is no express prohibition in the Constitution against the practice; and the fact that probate judges are explicitly excepted from the provision that judges of courts of record shall be learned in the law would seem to have been a recognition of the practice, if not an authorization of it. There is certainly very little (if any) more reason for requiring the judge of a county court who tries only misdemeanors to be learned in the law than there is for requiring judges of the probate courts to be so learned. The duties and functions of the probate court are without doubt of as much importance and sacredness as those of the county court; and their proper discharge requires as much legal lore as the proper discharge of those of the latter court requires. Many of the functions and duties of the county court are now, and have always been, discharged by justices of the peace, who are not required to be learned in the law, and to whom we think it unquestionable that the Constitution does not, and was not intended to apply.

Moreover, we think section 139 of the Constitution clearly authorizes the Legislature to impose upon the probate judges or other officers or persons the duties and functions of the county court. But we do not think that the fact that the county court might, for some purposes, be considered a court of record, requires that probate judges shall be learned in the law, whatever might be the result as to other persons if the county court should be considered a court of record. So far as the probate judges are concerned, it is immaterial, we think, whether the county court, the duties and functions of which they are required to perform and discharge, is or is not, a court of record. They are not

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judges of such county courts, though they, as probate judges, are required to discharge the duties thereof. They do not thereby hold two judicial offices—holding only one office, but by law being required to discharge the duties of three courts, the probate, the county, and the commissioners'.

Unless otherwise provided by special statute, it now is, and ever since 1866 has been, as obligatory upon a probate judge to perform the duties pertaining to a county court, together with those imposed upon him as a member of the commissioners' court, as it is the duties pertaining to the probate office. He is required to give two separate bonds for the faithful discharge of these duties. The probate judge might be required to give other bonds for the performance of other duties in addition. But the fact that he discharges the duties of two or more courts does not make him hold two offices in violation of the Constitution. There is in such cases a multiplicity of duties and functions, but no multiplicity of offices. If it should be considered that the probate judgeship and the county court judgeship were separate and distinct offices of profit and trust, any one person might be ineligible to hold both at the same time, and ineligible to hold the latter office unless he were learned in the law, because of sections 154 and 280 of the Constitution. We are aware that there are authorities and decisions to the effect that one officer or person cannot *ex officio* discharge the duties or functions of two offices of public trust and profit at the same time because violative of the constitutional provision; but we are not willing to follow these to the extent of holding that a probate judge cannot under our Constitution *ex officio* discharge the duties pertaining to either the commissioners' court or the county court. The practice and custom has too long prevailed,

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has been sanctioned, if not expressly authorized, by too many different Constitutions and constitutional conventions, to be now stricken down. We think it not open to question that our Constitution makers intended, and that the Constitution should be interpreted to mean, that such statutes are multiplicative of duties and functions, rather than of offices. In our opinion it does not necessarily follow that, because the judge of one court is by statute required to perform certain duties and exercise certain functions pertaining to another, he thereby holds two offices, or that he is judge of both courts. The Legislature, unless prohibited, may establish a court without providing for the election or appointment of any officers thereof. It may, unless prohibited by the Constitution, prescribe that the work of a court thus created shall be performed by other officers. This is what was done when county courts were created by the Penal Code of 1866. No officers of the county court were then provided, the Code merely providing that the probate judges should do the work and business of the court so created. It was, in fact, merely taking from the circuit and the justice courts a certain part of their jurisdiction and duties, and transferring the same to the probate courts or the judges thereof. No new office was thereby created, although a new court was erected.

It is true that certain local acts creating county courts provided for separate officers, but we are speaking of the general law as to county courts, and, if the local act provided that the judge of probate should discharge the duties pertaining to the county court, then, of course, the rule would be the same, whether the local law conferred more or less jurisdiction than the general law. That this is the proper construction to be placed upon our Constitution, considered as a whole,

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we feel no doubt. The Constitution expressly confers upon the Legislature the power to create courts of inferior jurisdiction (within certain limitations not necessary to be here mentioned), together with the authority to define and prescribe the powers and duties of the officers thereof; and provides that the judges of such court "shall be elected or appointed in such mode as the Legislature may prescribe." This charge was evidently devised to meet the decision of this court in *Roundtree's Case*, 51 Ala. 51. It is, as we have before said, a part of the judicial history of this state that the duties and functions of county courts have been performed or discharged by the probate judges with but few instances of exception; and that, as a matter of fact known to all men, such judges as a rule have not been learned in the law—in other words, have not been lawyers. Again, certain judicial functions from the beginning of our state government have been conferred by the Legislature upon certain persons or officers well known not to be learned in the law—as, for instance, clerks, registers, masters of the courts, and sheriffs. And evidently to obviate all doubt upon this subject the Constitution of 1875 (section 139) expressly authorized such investiture of the judicial power. As examples of legislative availment of this authority, it may be noted that by statute many judicial functions are conferred upon registers in chancery, in addition to their clerical duties, and they are made *ex officio* judges of the probate court, when the judge thereof is disqualified. Coroners are made both judicial and executive officers, and are *ex officio* sheriffs, when there is no sheriff to act. The constitutionality of these statutes has never been questioned or doubted, so far as we are advised. Nor was it ever supposed that the register or the coroner, in such cases was holding two

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offices. These and similar statutes have stood too long, been sanctioned by too many new Constitutions and different Legislatures, and sustained by too many decisions of this court, to be now successfully assailed. Nor do we think it was the purpose or effect of the change in section 154 of the Constitution—whereby judges of courts of record are required to be learned in the law—to strike down these various statutes or prevent the passage of similar ones.

The Supreme Court of Massachusetts has taken the same view of a similar provision of the Constitution of that state. That Constitution provided that “judges of the court of common pleas shall hold no other office under the government of this commonwealth.” The Legislature of 1843 provided that all the duties of municipal courts should be performed by the justices of the court of common pleas; and the act was held not to be violative of the constitutional provision.—*Brien v. Com.*, 5 Metc. (Mass.) 508. The court in that case said: “We think the St. of 1843, c. 7, must be understood and construed as a general and entire transfer to the court of common pleas of all criminal matters which had heretofore been cognizable by the judge of a municipal court; and therefore, if an appointment could now be made of a municipal judge, for the reason that the office has not been specially abrogated, yet the individual holding such office would exist as a judge in name only, and without any authority or jurisdiction. It seems, however, to result from the considerations we have suggested that the office of judge of the municipal court was virtually abrogated by the act transferring its duties to the court of common pleas. The result to which we have come is, therefore, that the act in question does not violate the constitutional provision contained in the amendments to the Constitution, art. 8, and is not

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void for that cause." We think these remarks of the Massachusetts court applicable to the case at bar. If a judge should be elected or appointed to the county court of Cullman, without amending the general or the special statute, however learned in the law he might be, he would be a judge without a "job." We see no reason in law or in fact why the Legislature cannot by either general or special statute authorize the probate judge of Cullman county to perform the duties and to discharge the functions relating to the county court of that county; and it seems to us wholly immaterial whether or not the latter be considered a court of record, probate judges being specially excepted by the Constitution from the general requirement that judges of courts of record shall be learned in the law. Moreover, he is not judge of the county court, but judge of the probate court, who is required to do the work of the county court.

We cannot on this appeal consider or pass upon the constitutionality of the local acts of the Legislature pertaining to the county court of Cullman, for the reason that the question was not raised or passed upon by the lower court. The only ruling of the lower court complained of on this appeal was that of sustaining a demurrer to the information. The information conceded, alleged, or informed the lower court that there was a county court for Cullman county by virtue of these statutes; that it was a court of record; and that the judge of probate of that county was not "learned in the law," and that, by virtue of section 154 of the Constitution, he was therefore ineligible to perform the duties or discharge the functions of that office. The respondent demurred to this petition, the judge below sustained the demurrer, and the relator declined to amend his information or to plead further, and suffered a final judg-

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ment, from which he appeals. So it is only the sufficiency of that information which we can examine on this appeal. Of course, when the relator declined to amend or to plead further, the only thing left for the judge to do was to dismiss the information or to render a judgment against the relator. The latter course, in this case, was pursued, evidently for the benefit of the relator, so that he could have the correctness of the ruling on the demurrer tested by this court on appeal. This court will never, on appeal, investigate or inquire into the constitutionality of statutes in civil cases, where the questions were not raised or passed upon below, unless the statute is necessary to the jurisdiction of this court or to that of the court below.

The only questions raised or attempted to be raised in the court below were whether or not the probate judge of Cullman county could discharge the duties of the county court of Cullman, if he was not "learned in the law," and whether or not the county court of Cullman was a court of record. The question whether or not there was a county court for Cullman was not raised nor attempted to be raised in the court below, and therefore was not decided by the judge below; and, of course, that question cannot be properly presented for the first time on this appeal. So far as the questions presented by this appeal are concerned, it is, we think, wholly immaterial whether the county court of Cullman county exists by virtue of the general, or by virtue of a special law, each providing, as it does, that the judge of the probate court shall discharge the duties and perform the functions of the county court.

We find no error in the ruling or judgment of the trial judge, and the same is in all things affirmed.

Affirmed. All the Justices concur, save DOWDELL, C. J., not sitting.

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Quo Warranto.

(Decided December 21, 1911. Rehearing denied February 15, 1912.
57 South. 942.)

1. Statutes; Enactment; Approved by Governor; Failure; Adjournment.—The constitutional provision that if any bill shall not be returned by the Governor within six days after it shall be presented to him, it shall become a law as if he had signed it, unless the legislature, by its adjournment, prevents its return, has in view a final adjournment and not a mere recess.

2. Same; Failure to Return.—The time within which the Governor may consider a bill without its becoming a law is measured by calendar days under the constitutional provision that a bill shall become a law, as if signed by the governor, if it shall not be returned by him within six days after presented, Sundays excepted.

3. Same.—Under the constitutional provision above referred to the return of the bill contemplates a return while the House is in session, and it cannot be returned to any officer or aggregation of members of the House when not in session.

4. Same.—Where a return of the bill by the governor to the House in which it originated is prevented by recess for more than a day, the two days after re-assembling in which it must be returned to the House under the Constitution to prevent it becoming a law without signature, must necessarily be legislative days.

5. Same; Appraisal by Governor; Evidence.—A memorandum made on a bill at the time by the Governor's recording secretary cannot be resorted to to show when a House bill reached the Governor, which was returned with objections to the House by the Governor, in order to determine whether it was so returned in six days as required by the Constitution; as the legislative record, with amendments to obviate the Governor's objection, and the presumptions therefrom in favor of its constitutional enactment are conclusive. Hence, where the legislative record and journals did not, and were not required to show when the bill was presented to the Governor, such memorandum was not admissible to show that the bill was not returned within six days.

6. Same; Special Laws.—General Acts 1911, p. 204, General Acts 1911, p. 209, and General Acts 1911, p. 591, are separate statutes, and are not special laws within the constitutional inhibition, although referring to the same general subject, a classification based on population being reasonable.

7. Constitutional Law; Statutes; Validity.—Appellate Courts will sustain the validity of an act unless it is clear beyond a reasonable doubt that it violates the Constitution.

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8. *Evidence; Judicial Notice.*—The courts take judicial notice of the journal of each legislative house.

9. *Same; Population of Cities.*—The court will take judicial notice that the city of Birmingham was the only city to which General Acts 1911, p. 204, was applicable when the act was passed, it being the only city having a population of 100,000.

(Simpson and McClellan, JJ., dissent.)

APPEAL from Montgomery Circuit Court.

Heard before Hon. W. W. PEARSON.

Information by the State on the relation of C. E. Crenshaw, Jr., and another, in the nature of quo warranto, directed to E. B. Joseph, and the others constituting the City Commissioners of Montgomery. From a judgment for respondent, relators appeal. Affirmed.

ARRINGTON & HOUGHTON, for appellant. The clause limiting the time which an executive has to veto a bill before it becomes a law is in practically every state constitution in the United States, and has been construed by Supreme Courts of other states, though it seems not to have been construed in this state. See latter part of section 125, Constitution 1901. The following authorities are cited as from other states.—45 N. H. 608; *Corwin v. Comptroller*, 6 S. C. 390; *State v. Michel*, 27 South. 656; *Harpending v. Height*, 2 Am. Rep. 432; 175 U. S. 454; 14 A. & E. Enc. of Law, 1102, 36 Cyc. 959; Lewis Sutherland Statutory Construction sec. 62, 64. The constitutional framers evidently recognized a distinction between the two words, adjournment and recess. As to what the distinction is see.—1 Cyc. 792; Web. Internat. Dic.; March's Thesaurus. From an examination of the legislative journals in view of the provision of the constitution above referred to it is plain that the legislature was in session on the sixth day, and stayed in session long enough to give the Governor a reasonable time to have returned the bill.—

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Gardner v. Johnson, 22 Ala. 501; *Thrower v. Brandon*, 89 Ala. 407; 24 Tex. 137. The record shows conclusively that the bill was not returned until after the six days had elapsed.—Sec. 11, Code 1907; *State ex rel. Porter*, 145 Ala. 547, and authorities supra. The mandates of the Constitution are the supreme law of the land.—*State ex rel. Skeggs*, 46 South. 268; *Board of Revenue v. Crowe*, 141 Ala. 148. The constitution is self executing.—*State ex rel. v. Foster*, 130 Ala. 162. It is competent to introduce parol evidence bearing on the question of presentation and return of the bill by the executive.—Authorities supra, and 36 Fed. 174; 2 Cal. 165; 33 Ill. 9; 87 Miss. 411; 48 Md. 295; 83 Ark. 448; 6 Wall. 499; *Hutchinson's Case*, 43 Ala. 721. The court takes judicial notice of the customs of the legislature.—*Roberson v. The State*, 130 Ala. 164; *Ensley v. Simpson*, 52 South. 66. The fact of adjournment may be shown by parol evidence.—26 Cyc. 552, and authorities supra. The court takes judicial notice of general laws, and of the legislative journals.—6 Wall. 508; 94 U. S. 260; 103 U. S. 683; 107 U. S. 202; *Walker v. Griffith*, 60 Ala. The court erred in putting the burden on plaintiff to show that defendants were illegally holding.—*Jackson v. State*, supra; *State ex rel. v. Foster*, supra; *Montgomery v. State*, 107 Ala. 383; 32 Cyc. 1460. The act is a local law.—26 A. & E. Enc. of Law, 620, et seq; 10 L. R. A. 700; *State v. Weekly*, 153 Ala. 648; *Ayars' Case*, 2 L. R. A. 577. The act contains many subjects not fairly indicated by the title, and not germane thereto, found in sections 2, 5½, 7, 8½, 9, 12, 13½, 15, 18½ and 27½.—*Yerby v. Cochran*, 101 Ala. 541; *Hamm v. State*, 156 Ala. 645; *State v. Miller*, 48 South. 496. Section 13 of the bill violates article 7 of the Constitution.—*Touart v. State*, 56 South. 211. The invalid parts are so connected that it cannot be presumed that the

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Legislature would have passed any without the others.—*Yerby Case, supra.*

W. A. GUNTER, and JOHN V. SMITH, for appellee. A motion to strike is in the nature of a demurrer, and cannot be supported by proof.—*Weffel Stillman*, 151 Ala. 363. The printed act was certainly *prima facie* evidence and receivable as such.—Sec. 1661, et seq., Code 1907. There being no rule of law as to presentment of bills to the Governor and return, when this particular bill was returned with the amendment suggested it became the duty of the legislature to inquire into and determine the facts, all of which were in *fieri*, relative to the presentation of the bill to the Governor, and its recesses between such presentation and return. It had the authority and it was its duty to do this as a preliminary to acting on the message.—*Sherman v. Story*, 30 Cal. 274; *Dannelly v. Cabaniss*, 52 Ga. 223; *Rumsey v. People*, 19 N. Y. 41. This action of the Legislature within the pale of its authority, and the just exercise of an undoubted jurisdiction is conclusive upon the world.—*People v. McCullough*, 71 N. E. 602; *State, ex rel. v. Jones*, 23 L. R. A. 340; *U. S. v. Aredondo*, 6 Pet. 315, and cases cited; *Voorhees v. Bank*, 10 Pet. 449. The court cannot look behind the journal to invalidate or uphold a statute. The law must stand or fall by the record.—*State v. Buckley*, 54 Ala. 509; *Harrison v. Gordy*, 57 Ala. 49; *Walker v. Griffith*, 60 Ala. 364; *Hall v. Steele*, 82 Ala. 562; *Ex parte Howard Harrison Co.*, 119 Ala. 484; *Robinson v. State*, 130 Ala. 164; *State v. Brody*, 148 Ala. 381; 14 L. R. A. 459; 23 L. R. A. 340; 143 U. S. 649; 82 N. E. 1072; 71 N. E. 602. The rule is founded upon two distinct reasons clearly drawn and sufficiently stated in the authorities *supra*. It

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will not do to say that the presentation of the bill to Mr. Nunnally was a presentation to and receipt by the Governor of the bill.—99 Mass. 636; 82 N. E. 1072; 71 N. T. 602. The recording secretary can only record the Governor's acts and cannot perform an official act for him.—Authorities *supra*. The House must be in session when return is made.—Authorities *supra*. The word "day" in section 125 means a natural or calendar day.—Authorities *supra*, and *Carter v. Henry*, 39 South. 690; *Hyde v. White*, 24 Tex. 137. On these authorities it must be held that if the House recessed or adjourned before twelve o'clock on the night of the 29th, such recess prevented the return.—Authorities *supra*.

SAYRE, J.—This information in the nature of quo warranto was filed by the appellant Crenshaw, in the name and behalf of the state, and sought a judicial determination to the effect that defendants were not entitled to hold office as commissioners for the city of Montgomery, as they were assuming to do. By their answer, defendants justified their assumption of official power and functions under an appointment by the Governor, alleging that their said appointment was made in pursuance of the act "to provide and create a commission form of municipal government and to establish same in all cities of Alabama," etc.; the same being shown at pages 289-315 of the printed volume of the General Acts of 1911. The act here referred to provides for a commission of five, to consist of the then mayor and four others to be appointed by the Governor, who should exercise all the powers of the municipal government. The legislative history of this act, as evidenced by the journals of the two houses of the Legislature and the enrolled act on file in the office of the Secretary of State, is the history of an unimpeachable ex-

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ercise of legislative power, as all parties concede, in every respect save one. At one point, a difference of opinion has arisen out of facts which we will here state: House Bill 322, out of which the act in question was developed by a course of legislative action, provided for a commission of three, to consist of the mayor and two others, who should be elected by the people. In this shape, the bill passed both houses and was signed by the Speaker of the House of Representatives and the Lieutenant Governor, presiding officer of the Senate, on March 22, 1911. The journal of the House next shows that on March 31st, the House being then in session, "the House concurred in and adopted the amendment offered by the Governor to the H. Bill 323, said Governor's amendment being as follows;" and here the amendment, which provided, among other things, for a commission of five, is set out at length. The Governor's message bears date March 31, 1911, and was spread upon the journal in pursuance of the Constitution (section 125), which requires in such cases that the House in which the bill originated, and to which it is returned, "shall enter the objections at large upon the journal and proceed to reconsider" the bill. In the meantime, as the journals show, the Legislature, on March 22d, adjourned to the 24th, and on the 24th to the 29th, and on the 29th to the 31st. Of intervening days, March 26th fell on Sunday. The appellant's contention is that, under the Constitution, the bill became a law in its original shape by reason of the Governor's failure to sign or return the same, with the amendments of his proposal to the House of Representatives, within six days, and that what further was done with the bill is of no consequence, as being wholly without the power of the Legislature.

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So much of the Constitution as is necessarily involved in the decision of the question presented reads as follows: "Every bill which shall have passed both houses of the Legislature, except as otherwise provided in the Constitution, shall be presented to the Governor; if he approve, he shall sign it; but if not, he shall return it with his objections to the house in which it originated, which shall enter the objection at large upon the journal and proceed to reconsider it. * * * If any bill shall not be returned by the Governor within six days, Sunday excepted, after it shall have been presented, the same shall become a law in like manner as if he had signed it, unless the Legislature, by its adjournment, prevent the return, in which case it shall not be a law; but when return is prevented by recess, such bill must be returned to the house in which it originated within two days after the reassembling, otherwise it shall become a law." The authorities are unanimous in holding that the adjournment of the Legislature contemplated in the quoted clause of the Constitution is a final adjournment. It seems necessary, also, to hold that the limit of time during the session—that is, where there has been no final adjournment—within which the Governor shall return a bill in order to prevent it becoming a law without his approval and signature, or, perhaps, it would better express the intent of the provision to say the period of time during which the Governor has the right to consider a bill without its becoming a law independently of him, must be measured by calendar days; for otherwise there would be no reason for excepting Sunday, on which day it is not the practice of legislative bodies in this country to sit for the business of legislation. When occasionally Legislatures have found it convenient or necessary to extend their sessions over into Sunday, it has been treated as an ex-

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tension of the previous day. But the sixth must be a legislative day also; for the Governor has six days in which he may consider the bill, and the requirement is that the bill, in case it be not approved, be returned to the house in which it originated. No congregation of the members of a house can, in a constitutional sense, constitute the House during the period of a recess, or exercise any of its constitutional functions. Nor can the return be made to any officer of the House when it is not in session. As was aptly said by Governor Jones in a message to the Senate in 1893: "A message from the executive to either branch of the Legislature, delivered to an officer of the body, who may not even be a member, and when it is not in session, for transmission and delivery to 'the House' when it shall reconvene, is an anomaly in parliamentary law. Messages from the executive to either branch of the General Assembly are invariably delivered to the House while in session, and not to the officers for them. Such has been the immemorial usage, and the same custom obtains concerning messages from one house to the other. There is neither parliamentary nor statute law which confers any functions upon the secretary or clerk of either house, while they are in recess, concerning the reception of messages from the other house or from the executive. Parliamentary law absolutely divorces clerks and secretaries from such functions, and is so exacting in this regard that one house will not receive a message from the other if the house sending the message is not in session. Indeed, it would seem that the express language of the Constitution, which requires the return 'to the House,' would repeal any parliamentary or statute law or custom, if such had obtained, whereby the return might be made to the clerk or secretary of the House, while it was not in session, for delivery to it when it

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reconvenes."—Sen. Jour. 1892-93, 304-310. Like considerations, and others arising out of the fact that during the period of a recess the Governor may find it exceedingly inconvenient, if not impossible, to communicate with the presiding officers of the houses, not to mention the element of unseemliness which may find its way into such an effort, lead to the conclusion that a bill may not be returned to the Speaker of the House or the presiding officer of the Senate in recess. So, then, a bill must be returned to the House while in session, which is to say that the sixth and last day during which the Governor may retain a bill without its becoming a law, if he sees fit to exercise his right of examination to the utmost, must be a legislative day. We conclude, also, that if the house in which a bill originated is in session on the sixth day after a bill has been presented to the Governor, so that the Governor has then an opportunity to return the bill, and there is a failure to return it, his constitutional right to return is exhausted. Any other rule would lead to the result that, with the daily passage of bills originating in either house, the limitation of time would be ineffectual, unless the Legislature should each day remain in session until the last minute of the day—a result not contemplated, of course. But where a return is prevented by recess—an adjournment, not final, but for more than a day—the two days after the reassembling in which the bill may be returned must of necessity be legislative days. On one the house reassembles as an organized body; on the other the bill may be returned to the house so organized.

Relator offered to show by a memorandum made at the time upon the bill by the Governor's recording secretary, and by other parol proof, that the bill reached the Governor's office and was delivered into the hand of

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his recording secretary on March 22d, and that this was the customary way of dealing with bills. The bill is not traced directly to the Governor's hand or notice before the 31st, the day on which he returned it to the House. If these facts constituted a presentation to the Governor, within the meaning of the Constitution, and if no rule of law or imperative policy, such as has always prevailed in cases of the character and in view of which the Constitution may be regarded as having been framed, stood in the way of a resort to parol evidence of them, then consideration of the dates to which we have referred, in connection with the interpretation given already to the clauses of the Constitution in question, must result in a judgment denying the validity of the act under which the respondents are holding office:

Cases have been cited from other jurisdictions to sustain the appellant's contention that the presentation shown by the memorandum was a presentation to the Governor. In *Wrede v. Richardson*, 77 Ohio St. 182, 82 N. E. 1072, 122 Am. St. Rep. 498, the ruling was that an entry in a record which was kept in the office of the Governor, pursuant to a requirement of law, and with his acquiescence used to perpetuate evidence of the presentation to him of bills which had been passed by the General Assembly, was competent and sufficient to prove such presentation. In *State v. Michel*, 52 La. Ann. 936, 27 South. 565, 49 L. R. A. 218, 78 Am. St. Rep. 364, it appears that the Constitution of Louisiana contains an imperative provision that, "as soon as bills are signed by the Speaker of the House and President of the Senate, they shall be taken at once, and on the same day, to the Governor by the clerk of the House of Representatives, or secretary of the Senate," and the validity of the act there in question was submitted to the court on an agreed statement of fact which stipulated

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the day of its presentation to the governor. The bill having been presented to the Governor between 10 and 11 o'clock at night, and the Governor having refused to receive it at that hour, the question litigated was whether such a tender of the bill was a constitutional presentation of it, and whether the fact that the Governor declined then to receive it rendered that presentation nugatory and ineffective. We have no doubt the question was properly decided against the Governor's contentions. So, too, in *Harpending v. Haight*, 39 Cal. 189, 2 Am. Rep. 432, the case was made upon agreed facts which stipulated that on a certain day the bill was, by the enrolling committee of the Senate, delivered to the Governor for his consideration. No question was raised concerning the fact of presentation; whether the Senate, by adjournment, had prevented a return, and whether the court had jurisdiction to compel the Governor, by mandamus, to cause the bill to be authenticated as a statute, are questions which constitute the entire subject-matter of the opinion. The same is true of *State v. South Norwalk*, 77 Conn. 257, 58 Atl. 759. The court in that case took occasion to say that "it [a bill] cannot be deemed to have been presented to him [the Governor] until it has been in some way put into his custody, or into that of some one properly representing him, in such manner that he has a reasonable opportunity to inspect and consider it," citing Opinions of the Justices, 99 Mass. 636. The court further said, "Due provision was made, shortly after the adoption of the Constitution, for such attendance on 'the Governor, or the person administering the office of Governor,' as might serve to secure his proper representation at the executive offices during the sessions of the General Assembly," citing the statutes of Connecticut. The case of *Soldiers' Voting Bill*, 45 N. H. 608, decided by the

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Supreme Court of New Hampshire in 1864, holds with the appellant on this point. In that case it was "assumed to be established" that the bill was "carried by the assistant clerk of the Senate to the executive chamber, in the state house, in accordance with the customary mode of presenting bills to the Governor, and was laid upon the table of the Governor, who was then absent from the room, but who had been there during the morning, and was expected to return that afternoon, but did not; that when said bill was thus laid upon the Governor's table some members of the executive council were present, and also Mr. Barrett, the State Auditor, who was the son-in-law of the Governor, and who had a table there in the executive chamber for the transaction of his business, near that of the Governor; that the assistant clerk of the Senate, when he entered the executive chamber with said bill, announced that he had a bill for the Governor." The Governor saw the bill on the next day, and the point at issue was whether there had been a presentation when the bill was laid upon the Governor's table. In brief, the conclusion that the bill had been presented when laid upon the Governor's table was rested upon the absurdity of requiring the officers of the Legislature, in order to perform their duty, "to follow the Governor wherever he may chance to go, whether in the state or out of it, upon his private business as well as public, and present bills to him in person wherever he may happen to be." The clear effect of the decision was that the bill must be deposited in the usual place, and the attention of the Governor, secretary, or other person in charge of the room called to the fact. What different effect was given to the presence of members of the executive council with whom, under the Constitution of New Hampshire, the Governor was required, from time to time, "to hold a coun-

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cil for ordering and directing the affairs of the state, according to the laws of the land," or to the presence of the Governor's son-in-law, or whether the janitor would not have served the purpose as well, does not appear. At any rate, the case would seem to permit the authority of legislative acts to rest upon a very uncertain basis. Our own case of *State v. Porter*, 145 Ala. 541, 40 South. 144, is also relied upon. That case drew into question the right of commissioners, appointed by the Governor, to hold an election to locate a county seat under the act of March 3, 1903.—Gen. Acts 1903, p. 117. The act provided for the appointment of commissioners whenever a majority of the qualified electors of a county should "petition the Governor in writing." Relator relied upon a petition of withdrawal. Justice ANDERSON said: "The law provides that the petition must be presented to the Governor, meaning that it must be lodged with him or his official force in some formal manner, so as to become an official document. And section 2 (page 119) of the act requires the Secretary of State to furnish a copy of said petition to the county site commissioners when he issues to them their commissions. Thus it must be observed that this original petition must get within the actual custody and control of the Governor. It therefore stands to reason that, in order for any of the signers to withdraw therefrom, they must do so with a degree of formality corresponding with that contemplated by the law in presenting the original petition." And it was held that a withdrawal petition, presented to Capt. Sedberry, who had been sent by the Governor to Cleburne county to investigate the bona fides of the original petition, but which never in fact reached the Governor's hands, was of no avail. Clearly that case rested upon considerations which have no place in the case at hand; for there

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no question of legislative procedure was involved. Per contra to the rule in New Hampshire, in Massachusetts, in a case where the Governor was out of the state when a bill passed the Legislature, the Supreme Judicial Court reasoned that as the duty of revision by the Governor was a personal duty, with which he alone was intrusted, it was necessary that the bill should be laid before him personally; that the Governor, whose duty it was to sign the bill, was entitled to have it before him, that he might have the opportunity to sign or return it with his objections. In this state, we have no constitutional or statutory provision requiring the presentation to be made to the Governor within any fixed time, nor any requiring an official record of such presentation to be kept. There is therefore no presumption of duty discharged by other officials to set over against the presumption that the Governor has observed the law, nor any record required by law to be kept, on which to place a finding that the bill was presented to the Governor more than six days before its return to the House. What effect the practice of subordinate officers of the two houses to present bills to the Governor's recording secretary and of the Governor's acquiescence in that practice should have in determining the sufficiency of such presentation may be left where we find it, with the apparent weight of reason and authority opposed to appellant's contention; for at some time prior to its return to the House the Governor took cognizance of the bill. The unavoidable question is whether parol evidence should have been received to show the point of time at which presentation was made, and this we have decided upon considerations which will be stated.

Attentive regard for the authorities and the reasons suggested pro and con has convinced us that, whatever

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parol evidence may have been available to appellant in support of his contention as to the fact, and however cogent that evidence may seem to the mind unconstrained by the rules of law and those considerations of vital policy obtaining with the courts whenever they come to the task of passing upon the constitutional validity of the acts of the co-ordinate Legislature, we are concluded by the legislative record of the law in question and the presumptions arising out of that record in favor of its constitutional enactment.

No view can be entertained which would cast the least doubt upon the court's complete acceptance of the doctrine that the mandates of the Constitution are the supreme law to all departments of the government, or the court's readiness to enforce the supreme law by declaring a legislative act invalid, where that fact is made to appear by competent evidence. But in this case the journals of the two houses and the enrolled bill, signed by the Governor and lodged with the Secretary of State for promulgation as law, present the official history of one continuous dealing with one bill, House Bill 323. On its face, the record is that of a statute valid in every particular of its enactment. The Constitution requires that each house shall keep a journal of its proceedings, and of the record thus made the courts take judicial cognizance.—*Moody v. State*, 48 Ala. 118, 17 Am. Rep. 28; *Montgomery Beer Bottling Works v. Gaston*, 126 Ala. 425, 28 South. 497, 51 L. R. A. 396, 85 Am. St. Rep. 42. And the decisions of this court have settled the proposition: "That in determining whether a bill enrolled, signed by the president of the Senate and the Speaker of the House of Representatives, and approved by the Governor, was in fact regularly and constitutionally enacted in all its provisions, and contains all the provisions which were enacted by the General As-

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sembly, recourse can be had only to the bill itself as so enrolled, signed, and approved, and to the journals of the two houses of the Assembly. The bill itself, wrought by such enrollment, signatures, and approval into an apparently valid enactment of the legislative department of the government, is a record of its own existence and integrity, in many jurisdictions constituting the only record to be looked to, and carries with it a presumption that it is the bill which the two houses concurred in passing; and this presumption can only be overcome by the contrary being made to affirmatively appear from that other record, the journals—the bound volumes of the proceedings transcribed, and signed by the presiding officers and deposited with and kept by the Secretary of State—of the respective houses of the General Assembly.”—*Robertson v. State*, 130 Ala. 169, 30 South. 494. And in *Ex parte Howard-Harrison Company*, 119 Ala. 484, 24 South. 516, 72 Am. St. Rep. 928, the language of the court is: “No other evidence is admissible. The journals can neither be contradicted nor amplified by loose memoranda made by clerical officers of the houses. Nor will it be presumed from the silence of the journals on a matter of which it is proper for them to speak that either house has disregarded a constitutional requirement in the passage of an act, except in those cases where the organic law expressly requires the journals to show the action taken, as where it requires the yeas and nays to be entered.” But appellant says it is the elementary duty of the court to know the statute law of the state, though judicial knowledge is not the personal knowledge of the judge, and for that reason he has the right to resort to any source of information which in its nature is capable of conveying to the judicial mind clear and satisfactory information, and it is urged that, since the relator stood ready to

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furnish evidence for informing the judicial knowledge, of greater moral weight than the mere presumption which arise in favor of the observance by the Legislature and the Governor of constitutional mandates, and to the effect that those mandates were not observed in fact, the court cannot avoid knowing that in fact the Governor did retain the bill for more than six days after it had been presented to him without signing it, and that thus it became law in its original shape. It is to be conceded that there may be cases in which the courts must enter into aliunde investigations as to the existence of a statute, or as to the time when it received executive approval by signing, or as to the time when it became law without such approval (*Walker v. Griffith*, 60 Ala. 367; *Gardner v. Collector*, 6 Wall. 499, 18 L. Ed. 890), though, to paraphrase the language of Judge Miller in the last-named case, we should reasonably expect to find a duty so very important as that of making some official written statement as to when a bill is presented to the executive, and when signed by him, the neglect of which may be followed by the most serious consequences prescribed by some positive and express provision of the Constitution, or, at least, by some act of the Legislature. The court would repudiate any record or any part of any record which depends upon forgery or other unlawful interpolation for its semblance of law, and such forgery or interpolation might be proved to the court as in the case of any other instrument which the court is bound to know; and where the Constitution requires, as a condition to the validity of a statute, that certain facts in respect to its legislative history must appear upon the journals, the court gives effect to the supreme law by declaring void a statute with a defective record; and where two irreconcilable laws are approved on the same day, or rights

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may depend upon the exact date of an approval which is not denied, nothing appearing in that respect, necessarily evidence is taken to make certain a fact otherwise at large. Here the case is different. Appellant does not deny the integrity of the record of the act under which defendants claim; nor does he claim that it is required by any rule of Constitution or statute to show more than it does. As before said, the statute in its last shape is perfect in its appearance, so far as concerns the regularity of its enactment; and its genealogy shows no break. The record history of the bill does not end with its first passage through the Legislature. It is resumed at a later day in the journals of the two houses, that of the House of Representatives showing that the bill was returned without approval, and with the proposal of amendments which would meet the Governor's objections. Subsequent dealing with the bill, down to and including the Governor's approval of it in its last shape, is admitted to have been perfectly regular, if the return was made in time. Appellant would impeach the effect of the record of the bill in its last shape by evidence in pais of a fact, concerning which a proper record is required to show nothing, contrary to what was the necessary finding of the Governor and the Legislature. This on a comprehensive theory that judicial knowledge must embrace every act of every official concerned in any way in the business of passing laws. Now, when the bill went back to the Legislature, it was within both the power and duty of that body to know whether the bill had become a law by reason of the Governor's failure to return it within the time limited by the Constitution, thus foreclosing all right to deal with the subject-matter except by a new bill, or whether the legislation thereby proposed was still in fieri and subject to amendment. Its power

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to proceed depended upon a question of fact which its sworn duty required it to decide, and which it was competent to decide, and which it did decide, thereby establishing, by necessary inference, the fact in accord with the implication of the Governor's return. On such a record, the presumption is conclusive that the facts were consistent with the legislative assumption of power. The principle here applied is set forth in the case of *United States v. Arredondo*, 6 Pet. 691-729 (8 L. Ed. 547), in these words: "It is a universal principle that, where power or jurisdiction is delegated to any public officer or tribunal over a subject-matter, and its exercise is confided to his or their discretion, the acts so done are binding and valid as to the subject-matter, and individual rights will not be disturbed collaterally for anything done in the exercise of that discretion within the authority and power conferred. The only questions which can arise between an individual claiming a right under the acts done and the public, or any person denying its validity, are power in the officer and fraud in the party. All other questions are settled by the decision made or the act done by the tribunal or officer, whether executive ([*Marbury v. Madison*] 1 Cranch, 170, 171 [2 L. Ed. 60]), legislative ([*McCulloch v. Maryland*] 4 Wheat, 423 [4 L. Ed. 579]; [*Satterlee v. Mathewson*] 2 Pet. 412 [7 L. Ed. 458]; [*Craig v. Missouri*] 4 Pet. 563 [7 L. Ed. 903]), judicial ([*Perkins v. Fairfield*] 11 Mass. 227; [*McPherson v. Cunliff*] 11 Serg. & R. [Pa.] 429 [14 Am. Dec. 642], adopted in [*Thompson v. Tolmie*] 2 Pet. 167, 168 [7 L. Ed. 381]), or special ([*Rogers v. Bradshaw*] 20 Johns. [N. Y.] 739, 740; 2 Dow. P. Cas. 521, etc.), unless an appeal is provided for, or other revision, by some appellate or supervisory tribunal, is prescribed by law." The rule here stated

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confines judicial knowledge to the record, where the record is authentic and complete in itself.

This rule is based upon practical considerations of the utmost importance. It would lead to intolerable conditions if the validity of statutes, evidenced in every way provided for authentication by the common law, by the Constitution, and by statutes made to that end, and under which the affairs of individuals and communities may have been long administered, were permitted to depend upon the precarious memory of witnesses and the uncertainties of parol proof. It is clear that if one of the steps necessarily involved in the enactment of a law, and not required by the Constitution to be affirmatively shown, or for the due exposition of which no law has been made, may be shown by evidence in pais not to have been taken, or not to have been taken properly, on the theory that the court knows all such things, "the entire subject of what the law is is withdrawn from the protection of the rules devised and applied for the purpose of securing certainty where doubt would be intolerable. The prompt aversion of the legal mind from the consideration of evidence in pais to show the invalidity of an officially promulgated statute is justified by a contemplation of the consequences which would follow."—*Wrede v. Richardson, supra*. Our conclusion that the trial court properly refused to receive the testimony offered by the relator in impeachment of the act, and that the memorandum stamped by the recording secretary upon the bill as first enrolled is of no consequence, to the extent, at least, it is inconsistent with the course of the Legislature, which treated it as untrue in fact, is required by the necessities of organized society, and is sustained by the weight of well-considered authorities in those states where these and closely allied questions have been carried to

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the courts for decision.—*People v. McCullough*, 210 Ill. 488, 71 N. E. 602; *Wrede v. Richardson*, *supra*; *Danielly v. Cabaniss*, 52 Ga. 211; *Sherman v. Story*, 30 Cal. 274, 89 Am. Dec. 93; *Rumsey v. People*, 19 N. Y. 41; *State ex rel. Reed v. Jones*, 6 Wash. 450, 30 Pac. 201, 23 L. R. A. 340, and note; *Stevenson v. Colgan*, 91 Cal. 649, 27 Pac. 1089, 14 L. R. A. 459, and note, 25 Am. St. Rep. 230.

At its last session, the Legislature passed four different acts on the subject of commission government for municipalities in this state. On March 31st, the Governor approved an act providing for the appointment of commissioners in all cities now having, or which may hereafter have, a population of as much as 100,000 according to the last federal census, or any such census which may hereafter be taken.—Gen. Acts 1911, p. 204. We judicially know that this act applied at this time to the city of Birmingham alone. On April 6th an act was approved, providing for a commission in cities now having, or which may hereafter have, a population of as much as 25,000 and less than 50,000 according to the last census.—Gen. Acts, p. 289. This act applies to the city of Montgomery alone, as populations now are. April 8th an act was approved for the government by commission of cities and towns which, to quote the act, "now are not, or hereafter may not be, within the influence or operation of any other valid legislative enactment authorizing or adopting the commission form of government."—Gen. Acts 1911, p. 330. Under this act, a commission for the city of Mobile has been organized, and a commission for any other town or city in the state, except Birmingham and Montgomery, might have been organized but for the passage, on April 21st, of an act providing for government by commissioners in all cities now having, or which may hereafter have, a pop-

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ulation of more than 1,000 and not more than 25,000.—Gen. Acts 1911, p. 591. The effect of this last enactment was to leave the city of Mobile as the only city in the state which might adopt the commission form of government, as provided in the act of April 8th, and the government of that city has been organized under that act. These acts differ much in detail; but the one broad purpose common to them is to abolish the government of municipalities by mayors and boards of aldermen, and to substitute therefor a board of commissioners to be elected generally by the people, but in all cases, save those provided for in the act of April 8th, the first board of commissioners was to be appointed by the Governor. In the case of cities falling within the operation of the acts of April 8th and 21st, it is provided that a vote of the people be first taken to ascertain whether they desire a change in the form of government. By the acts of March 31st and April 6th, no opportunity is given for an expression of the popular will; but the appointment of commissioners in the first place is made mandatory upon the Governor. On these acts and the differences to be noted in their provisions, some only of which have been mentioned, appellant bases an argument that the act of April 6th is unconstitutional as being a local act. If the act is local it is unconstitutional. It will be observed that these acts, taken together, arrange the cities and towns of the states into four classes: (1) Cities and towns having a population between 1,000 and 25,000; (2) those between 25,000 and 50,000; (3) those between 50,000 and 100,000; and those of 100,000 and over. And provision is made by which cities shift from one class to another as their populations change. The Constitution does not prohibit classification on substantial grounds; and this

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court has recognized differences in population as a proper basis for the classification of municipal corporations.—*Griffin v. Drennen*, 145 Ala. 128, 40 South. 1016. But in *State v. Weakley*, 153 Ala. 648, 45 South. 175, ruling here, too, in accord with the authorities generally, it is held that indiscriminate classification as a mere pretext for the enactment of laws essentially local or special cannot be allowed. The argument for appellant is that there are no essential differences between cities of these different classes, such as call for differences in the regulation of their municipal powers and local government; and, further, that these four acts are in *pari materia*, and must be construed as one act, and that, when considered so and in connection with well-known agitations of public opinion going on at the time, it is apparent that the purpose was to legislate to meet local conditions and demands, rather than to frame a code of laws applicable to all cities similarly situated. It is our duty to sustain these acts, unless it is clear, beyond a reasonable doubt, that they violate some provision of the fundamental law. The argument against them presents a novel application of the doctrine of construing statutes in *pari materia*. To link a number of separate acts together, each unobjectionable in itself, for the purpose of destroying all or any of them, would, so far as we are advised, be without precedent. We think rather that each of these acts is to be judged on its merits as they appear in the act itself. Classification by numbers having been recognized as legitimate, it must be a task of great difficulty to say just when the Legislature has overstepped the bounds of its power in arranging a classification on that basis. And while our knowledge, in an undefined and irresponsible way, of conditions and opinions operating upon the Legislature at the time of these acts may be

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such as to create suspicion that the effort was to provide differently for each of the three largest cities of the state on consideration of local demands, not based on essential differences of situation or the real interests of their inhabitants, we cannot look beyond the act itself for motives. A case might occur in which this basis of classification might be pushed so far that the court would be required to pronounce it unconstitutional. The Supreme Court of Pennsylvania, whose decisions on this subject we have followed, found such a case in *Ayar's Appeal*, 122 Pa. 266, 16 Atl. 356, 2 L. R. A. 577; but we think that condition is not sufficiently demonstrated by this statute. In form, at least, the act is not open to the objection taken to it. The range of numbers in the class in which the city of Montgomery falls is fairly large; and we are unable to say with perfect assurance that the Legislature may not have found differences between cities of this class and others having populations of less than 25,000 or more than 50,000 which justified differences in organization and local regulation. While not disposed to encourage this character of legislation, we cannot in this case say it transcends the constitutional power of the Legislature, and so are constrained to withhold interference.

Our conclusion is that the judgment of the court below must be affirmed.

Affirmed.

MAYFIELD and SOMERVILLE, JJ., concur. DOWDELL, C. J., not sitting.

ANDERSON, J.—While concurring in the conclusion and in the affirmance of the judgment of the trial court, I wish to ground my action in doing so upon reasons other than those advanced in the opinion of my Brother

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SAYRE. I think that it may be conceded that there was such a presentation to the Governor on March 22d, as disclosed by the stamp upon the bill by the recording secretary of the Governor, and his receipt for same upon the book kept by the enrolling clerk of the House, and that the position assumed by Justices SIMPSON and McCLELLAN on this proposition is sound; yet I am of the opinion that the bill so presented did not become a law because of a default on the part of the Governor in failing to return the same within the time prescribed by section 125 of the Constitution of 1901.

Section 125, among other things, provides: "If any bill shall not be returned by the Governor within six days, Sunday excepted, after it shall have been presented, the same shall become a law in like manner as if he had signed it, unless the Legislature, by its adjournment prevent the return, in which case it shall not be a law; but when return is prevented by recess, such bill must be returned to the house in which it originated within two days after the reassembling, otherwise it shall become a law," etc. (Italics mine.) It is manifest that the Governor is given six full calendar days; therefore, excluding March 22d and the intervening Sunday, the sixth day was March 29th, and the Governor had all of that day within which to get it to the House, and could not be in default, unless the House was in session contemporaneously with the expiration of his time. If the House is at recess upon the expiration of the time given the Governor for the consideration and retention of bills, he then has two legislative days after the House reassembles within which to return bills. All seem to agree that the six days, which excludes Sunday, means calendar, as distinguished from legislative days, and that the other two days given mean legislative days; then, to my mind, it would be mon-

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strous to charge the Governor with calendar days in computing the time, and at the same time credit him only with legislative or fractional calendar days, for the purpose of striking down a solemn legislative enactment. In other words the contention is that the Governor must return the bill within six calendar instead of legislative days, yet when the sixth day arrives, and although he is given six full days within which to return the bill, he is in default if he fails to get it to the House while in session on said sixth day, notwithstanding it may assemble early in the morning and recess or disburse within a few minutes thereafter and until some future day. To adhere to this contention, as some of my Brothers seem inclined to do, is not only inconsistent, but is, to my mind, violative of the letter, spirit, and intent of section 125 of the Constitution. The Constitution does not give the Governor five full calendar days and so much of the sixth day only as may be covered by the session of the House on said day, but gives him six full days, whether the House is or is not in session; and he is only required to get it to the House on said sixth day, in case it happens to be in session up to the expiration of same, or until 12 o'clock that night.

"Recess" has a plain and well-known meaning, when applied to legislative bodies. It is defined in Webster's International Dictionary, par. 3, as follows: "Remission or suspension of business or procedure; intermission, as of a legislative body, court, or school." I doubt if there was a single member of the constitutional convention who entertained the slightest doubt that recess did not mean every intermission or suspension of the legislative body, as distinguished from the previously known Christmas holiday; and they did not mean to make it cover and apply only to the customary Christmas holidays, for the reason that the same convention

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changed the time for the legislative sessions from November to January, thus, in effect, practically excluding Christmas. It was evidently intended that "recess" should cover any suspension or remission of either house short of a final adjournment, whether it be from one day to another, one week to another, or one month to another. Therefore, if the House was not in session up to 12 o'clock of the night of March 29th, the Governor was necessarily prevented from returning the bill, if he saw fit to consider and hold it the full time given him under the Constitution; and he had two legislative days after the reassembling of the House within which to return said bill, and which the record shows he did. "Words of common use are to be understood in their natural, plain, ordinary, and genuine signification, as applied to the subject-matter of the enactment."—Endlich, Interpretation of Statutes, § 2, "When the language is not only plain, but admits of but one meaning, the task of interpretation can hardly be said to arise (and these incidental rules which are mere aids, when the meaning is clouded, are not to be regarded.) * * * It is not allowable, says Vattel, 'to interpret what has no need of interpretation.' The Legislature must be intended to mean what it has plainly expressed; and consequently there is no reason for construction."—*Parks v. State*, 100 Ala. 653, 13 South. 756.

The Journal does not recite the arrival of 12 o'clock and the adjournment of the House, but merely shows that the House adjourned on the night of the 29th of March, and is silent as to the hour; therefore it did not adjourn after 12 o'clock, but must have adjourned before the 30th, and presumably before 12 o'clock, and it was not therefore in session contemporaneously with the expiration of the time given the Governor within which to return the bill. This presumption is strength-

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ened by the subsequent receipt and consideration of the bill, and which was a legislative determination that the Governor was not in default on the night of the 29th, and that a return of the bill on said night was prevented by a recess of the House before his time for returning same had expired. Nor do I think that the trial court erred in refusing to appellant the right to show by parol that the House adjourned the morning of the 30th, instead of on the 29th of March, as recited in the Journal, as this would impeach or contradict the legislative record by parol, and which should not be permitted.

It is my opinion that the act in question was legally passed, and that the act, as presented to the Governor on March the 22d, did not become a law. I therefore concur in the affirmance of the judgment of the circuit court.

SIMPSON, J.—(dissenting.)—I hold that, even though the law may not specifically provide how the record shall be kept in regard to bills which are passed and transmitted to the Governor for approval, yet, if a record is in fact kept and preserved in connection with the proceedings of the Legislature, the court should have the benefit of that record in tracing the history of the bill. If it is true that a book is kept by the clerical officers of the Legislature, in which the recording secretary of the Governor signs receipts for bills when presented, and that book is, with the other papers required by law to be filed in the office of Secretary of State, filed in said office, said book should be admitted in evidence by the court.

I hold, also, that the record kept by the recording secretary of the Governor, showing the dates when the bills are presented to that office, and his official stamp on the bill, should have been admitted in evidence. These

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are not in the nature of parol testimony, but constitute the official record of the history of the bill, through its various stages, until it becomes a law.

For these reasons, I dissent from the opinion of the majority of the court.

McCLELLAN, J.—(dissenting.)—The journals of the House of Representatives and of the Senate show that House Bill 323 was signed by the Speaker of the House and by the President of the Senate on March 22, 1911. Its title foreshadowed an act “to provide and create a commission form of government and to establish same in all cities of Alabama which now have, or may hereafter have, a population of as much as twenty-five thousand and less than fifty thousand,” etc. It also appears from these journals that on March 22, 1911, the bodies adjourned to March 24, 1911; that on March 24, 1911, they adjourned to March 29, 1911; and that on March 29, 1911, they adjourned till March 31, 1911.

It is conceded that there is no allusion in the journal of either body to House Bill 323 on March 24th and March 29th, the days on which the bodies were in session. On March 31, 1911, the House Journal recites that the House concurred in and adopted the amendment proposed by the executive to House Bill 323, setting out the amendment proposed by the Governor, as well as the executive's message, dated March 31, 1911, in that connection.

The respondents would justify their tenure of the offices of commissioners of the city of Montgomery upon the proposition that the amendment proposed by the executive on March 31, 1911, became a part of the act establishing the commission form of government in the city of Montgomery.

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Under the bill as signed by the presiding officers of the two houses on March 22, 1911, two commissioners, with the mayor, were to constitute the governing body of the city; the two commissioners to be elected by the people. The amendment proposed by the executive provided for a commission of five, four of them to be appointed by the executive, and the then mayor to be the fifth.

The relator (appellant) insists that the amendment proposed on March 31, 1911, by the executive, and on that date adopted by the houses, never became a part of the act in question, for the executive's failure or inaction for more than six days after the presentation of the bill to sign it, or to veto it, or to propose an amendment thereto, according to the requirement of section 125 of the Constitution, operated to impress the act, as signed by the presiding officers of the two houses on March 22, 1911, with the character and quality of a complete statute, incapable of change or amendment or repeal, save in and by recourse to the constitutional methods of changing, amending, or repealing that which is already *law*.

It thus appears that the solution of the issue presented is to be found in the determination of the inquiry, Did the amendment proposed, March 31, 1911, by the executive become *law*? *What is the law* is a matter, necessarily and in respect of *finality* of pronouncement, committed for decision to the judicial department of the government, when properly invited to do so.—Cooley's Const. Lim. pp. 76, 77, 131, 133, 228; *Walnut v. Wade*, 103 U. S. 683, 689, 26 L. Td. 526; *Town of South Ottawa v. Perkins*, 94 U. S. 260, 267, 24 L. Ed. 154; 8 Cyc., pp. 806, 807, 843.

In this instance, the judicial function is invoked to determine whether the amendment suggested by the

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executive became *law* under procedure conformable to constitutional requirements. It is only by observance of those requirements that *law* may be enacted; and whether such requirements have been observed in the given case is the subject of judicial inquiry and determination.—*Jones v. Hutchinson*, 43 Ala. 721, 724, 725; *Moog v. Randolph*, 77 Ala. 597, 599; Cooley, pp. 186, 187; *Gardner v. Collector*, 6 Wall. 511, 18 L. Ed. 890; *Town of South Ottawa v. Perkins*, 94 U. S. 260, 268, 269, 24 L. Ed. 154. Whether these constitutional requirements were, in a particular instance, observed is a question solvable alone by the court in the lights of its *satisfactorily advised judicial knowledge*, and so necessarily excluding the advice or service of a jury in deciding it.—*Town of South Ottawa v. Perkins, supra*; *Gardner v. Collector, supra*; *Jones v. United States*, 137 U. S. 202, 216, 11 Sup. Ct. 80, 34 L. Ed. 691; *Walnut v. Wade*, 103 U. S. 689, 26 L. Ed. 526. The *means* whereby the judicial mind is so advised as to be able, consistently with the irrefutable presumption and assumption that the courts know the law; to respond to the inquiry involving the *existence* of a statute, etc., is, in a sense, *evidence*, leading to a finding of *law*, not of *fact*.—*Walnut v. Wade*, 103 U. S. 689, 26 L. Ed. 526. “Any particular state may, by its Constitution and laws, prescribe what shall be conclusive evidence of the existence or non-existence of a statute; but the question of such existence or non-existence being a judicial one in its nature, the mode of ascertaining and using that evidence must rest in the sound discretion of the court on which the duty in any particular case is imposed.”

Of the character, generally speaking, of the evidence, properly advisory of the judicial mind in respect to matters of judicial cognizance, it is said in *White v.*

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Rankin, 90 Ala. 541, 8 South. 118: "If the cognizance extends beyond actual knowledge, the judge may resort to any authoritative sources of information, and inform himself of the fact in any way he may deem best, in his discretion," etc. In *Gardner v. Collector, supra*, it was said "that, whenever a question arises in a court of law of the existence of a statute, or of the time when a statute took effect, or of the precise terms of a statute, the judges who are called upon to decide it have a right to resort to any source of information which in its nature is capable of conveying to the judicial mind a clear and satisfactory answer to such question, always seeking first for that which in its nature is most appropriate, unless positive law has enacted a different rule." The doctrine of this decision was favorably noted in *Walker v. Griffith*, 60 Ala. 367. To like effect is *Town of South Ottawa v. Perkins*, 7 Ency. of Ev. pp. 961-963, 1031, and notes thereon.

It is hardly necessary to add that rules of law pertaining to the introduction or admissibility of evidence in trials of ordinary issues of fact have no effect or bearing, when the judicial mind seeks or is seeking to avail of information to enable it to exercise judicial knowledge.—7 Ency. of Ev. p. 879, and notes thereon.

Under our organic law, to the executive is apportioned an important part in the performance of the legislative function. And it is entirely plain from the Constitution that the executive cannot delegate *his* part in the legislative process to anyone; for it is to the judgment of the person lawfully exercising the authority of the executive that the Constitution commits so much of the legislative function as it imposes upon the executive. The particulars and the extent of that legislative function, thus imposed upon the executive, is, so far as

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affects the present inquiry, to be found in section 125 of the Constitution. The section (125) is as follows:

"Every bill which shall have passed both houses of the Legislature, except as otherwise provided in this Constitution, shall be presented to the Governor; if he approve, he shall sign it; but if not, he shall return it with his objections to the house in which it originated, which shall enter the objections at large upon the journal and proceed to reconsider it. If the Governor's message proposes no amendment which would remove his objections to the bill, the house in which the bill originated may proceed to reconsider it, and if a majority of the whole number elected to that house vote for the passage of the bill, it shall be sent to the other house, which shall in like manner consider, and if a majority of the whole number elected to that house vote for the passage of the bill, the same shall become a law, notwithstanding the Governor's veto. If the Governor's message proposes amendment, which would remove his objections, the house to which it is sent may so amend the bill and send it with the Governor's message to the other house, which may adopt, but cannot amend, said amendment; and both houses concurring in the amendment, the bill shall again be sent to the Governor and acted on by him as other bills. If the house to which the bill is returned refuses to make such amendment, it shall proceed to reconsider it; and if a majority of the whole number elected to that house shall vote for the passage of the bill, it shall be sent with the objections to the other house, by which it shall likewise be reconsidered, and if approved by a majority of the whole number elected to that house, it shall become a law. If the house to which the bill is returned makes the amendment, and the other house declines to pass the same, that house shall proceed to reconsider it, as

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though the bill had originated therein, and such proceedings shall be taken thereon as above provided. In every such case the vote of both houses shall be determined by yeas and nays, and the names of the members voting for or against the bill shall be entered upon the journals of each house, respectively. If any bill shall not be returned by the Governor within six days, Sundays excepted, after it shall have been presented, the same shall become a law in like manner as if he had signed it, unless the Legislature, by its adjournment, prevent the return, in which case it shall not be a law; but when return is prevented by recess, such bill must be returned to the house in which it originated within two days after the reassembling, otherwise it shall be a law, but bills presented to the Governor within five days before the final adjournment of the Legislature may be approved by the Governor at any time within ten days after such adjournment, and if approved and deposited with the Secretary of State within that time shall become law. Every vote, order, or resolution to which concurrence of both houses may be necessary, except on questions of adjournment and the bringing on of elections by the two houses, and amending this Constitution, shall be presented to the Governor; and, before the same shall take effect, be approved by him; or, being disapproved, shall be repassed by both houses according to the rules and limitations prescribed in the case of a bill."

Omitting consideration of "appropriation bills," for which special provision is made (section 126), the executive may, within the time prescribed, take one of several courses; as he may be advised, with respect to a bill presented to him, viz.: (a) Permit it to become a law by withholding therefrom his approving signature until the period prescribed has elapsed; (b) approve the bill

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by signing it within the period prescribed; (c) return the bill, without signing and within the period prescribed, to the house in which it originated, with his objections thereto and such amendments as would obviate his objections; (d) within the period prescribed return the bill to the house originating it, proposing no amendment which would remove his objections. The last two alternatives are, in effect, affirmative disapprovals—a veto—though the subsequent legislative course is different in the two instances. In the former, it is the legislative right to consider and determine whether the amendment seasonably proposed by the executive shall be accepted by the legislative bodies; while in the latter the legislative right is to decide whether the bill shall pass, notwithstanding the seasonably expressed executive objection, in which event, to make the bill a law, a majority of the elected membership of each house must vote to that end. The alternatives enumerated are executive prerogatives, the exercise of which no other department of the government can hinder or impair, much less defeat. And it is the duty and supreme province of the judicial department, in its proper sphere of interpreting the Constitution and of deciding what is the law, when properly invited to so determine, to pronounce in accord with the requirements of the organic law, and to protect and effectuate the powers and functions assured thereby to each department of the government.

It is not open to question or to doubt that the reference to *adjournment*, in section 125, is to *final adjournment*—the end of (for) the *session* stipulated in the organic law; and that the reference to *recess* is to suspensions of legislative deliberation (by the house to which the executive return of the bill may be made) for some measure of time beyond *one day*. It is equally as clear that the return of a bill, by the executive, must be to

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the body—the house—in its organized capacity, and not to an official, or other representative, of the body to which the executive may make, within his prerogative, his return of the bill.

Three periods, two controlled by contingencies, are allowed the executive for his action or nonaction, leading to the legislative consequence before indicated. He must, if he would prevent the bill's becoming a law by his nonaction, properly return it "within six days, Sundays excepted." Since Sundays are expressly excepted, and since that day is universally respected by all the departments of the government, it is clear that the *six-day* limitation for the return of bills contemplates calendar days. But since, also, the executive return of a bill must be to the house originating it, when in session, to avail of the power given him to that end, the return on the last or sixth day must be effected, if that body is in session, on that day; hence to that extent the *full* calendar day, on the sixth day, must yield to the other mentioned requirement of the organic law. If such was not the rule, the limitation of *six days* for the executives action would be prolonged beyond that expressly provided for by the Constitution. The general publicity of legislative action, the proximity, though separate, of the executive offices to the places of legislative deliberation, and the necessarily constant communication, in the discharge of the respective public duties with which those departments are mutually concerned, between those departments refute the suggestion that either body of the lawmaking department could assemble on a day without such knowledge of the executive as would enable him to return a bill as he might be advised.

If the house in which the bill originated is *in recess* on the sixth day after the presentation of the bill to the executive, *two days* after reassembling are allowed him

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in which to return the bill, which opportunity for action, if not availed of, permits the bill to become a law. The two days thus stipulated must, in consequence, be days on which the body originating the bill is in session.

There is still another period provided for in section 125, and that relates to the limitation for the *approval* of bills by the executive after *final adjournment* of the *Legislature*. That period is *ten days*. These are calendar days of course; no return to the body originating the bill being contemplated or possible. But this period is conditioned on the presentation of the bill to the executive "within five days before final adjournment of the Legislature." Obviously the stated *five-days* prescription is a *condition precedent* to the executive right to *approve and deposit* the bill, *as a law*, with the Secretary of State, during the *ten days after final adjournment*.

It is insisted by counsel for the respondents that the *presentation* prescribed in section 25 contemplates and requires that bills be "presented in fact to the Governor in person," and this upon that which is unwarrantably (though in the abstract it is obviously sound) assumed to be the premise, viz., that in the process of legislation the executive's undebatable judgment and discretion is the constitutional intent. That contention is wholly untenable upon reason and authority.

The transmission of a bill from the Legislature to the executive is particularly referred to five times in section 125. This act of transmission is required, in four instances, by the use of the term "presented." In prescribing what shall be done with a bill to which the executive have proposed amendment, and in which amendment both houses concur, it is written, "the bill shall again be sent to the Governor *and* acted on by him as

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other bills." While the direction for transmission is there prescribed by the word "sent," the immediately following provision expressly commits the bill, so amended upon the executive's proposal, to the identical category, subjects it to the same provisions, in which are "other bills;" and thereby clearly negativing any notion that bills amended by the Legislature, on the seasonable proposal of the executive, occupy any character or status, with respect to executive action, different from that of "other bills." It is evident from this use of "sent," as stated, that the Constitution makers never intended, through the mere employment of "presented," to invest the process of transmission of a bill to the executive with the strictness a literal translation the term "present" in some instances imports. In short, the use of "sent," in reference to the same character of act with respect to which "present" is employed is forceful to show that "present" was not regarded as having any particular, strict significance; and that the obligation imposed on the Legislature is discharged when a bill that has been passed is "sent to the Governor," a distinct conceit from that expressed in the literal interpretation of the personal proffer or delivery of it to the executive, wherever he may be searched out and found. "Presented" has had place, in the connection with which we are now concerned, in each of our Constitutions since the admission of the state into the Union. In the natural order of things, every bill passed by the Legislature (or General Assembly, as formerly called) during 90 years of the states life has invoked the construction, observance, and application, in legislation, of the provision of the organic law of which *presentation* of bills to the executive has been and is now, in substance, a part.

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Contemporaneous and practical construction or interpretation of constitutional provisions by the executive and legislative departments of the government will and should be considered by the courts in passing upon constitutional questions; and, though not accepted, except as to questions of a discretionary character, by the courts as conclusive, such practical, contemporaneous construction by departments particularly charged with the observance or execution of the provision under consideration, and acquiesced in for a great period of time, is of peculiar potency in the make-up of the judicial construction, provided the practice be not in contravention of the clear constitutional intent.—Cooley, pp. 102-107; 8 Cyc. pp. 736-739, and notes thereon. If, under a constitutional provision with the observance or execution of which the executive and legislative departments are concerned, a distinct practice has been observed or prevailed, it cannot be a matter of doubt that the reordination of the provision in a subsequent organic law necessarily brings with it for the consideration, by way of advice, of the judicial mind, in the interpretation or construction of that provision, the well-understood practice which has been pursued by those departments in the effort, in presumed good faith, to carry out the mandates, and to respect the restraints, of the Constitution, unless, of course as has been stated, the clear intent of the provision, when read in the light of the whole instrument, forbade or forbids the practice so pursued. If, as has been ruled by the highest judicial authority in our country, general customs and usage have the force and effect of law, if not opposed to positive law (*United States v. Arredondo*, 6 Pet. 691, 8 L. Ed. 547; *Slidell v. Grandjean*, 111 U. S. 412, 421, 4 Sup. Ct. 475, 28 L. Ed. 321), obviously the best wisdom commends to the judicial mind, called to interpret consti-

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tutional provisions, of long existence and execution, of the class now under judgment, the ascertainment and consideration of the practice thereunder by those whose duties required their observance or execution of such provisions. Reason not only suggests this aid to constructions, but that and a proper regard for orderly processes in government demand the taking account thereof as a conservative means of discovering the *true* constitutional intent. The principle has been pointedly recognized by this court in *Taylor v. Hutchinson*, 145 Ala. 202, 206, 40 South. 108; *Ex parte Hardy*, 68 Ala. 303, 318; *Moog v. Randolph*, 77 Ala. 597, 606; *Farrior v. New Eng. Mortg. Co.*, 88 Ala. 275, 279, 7 South. 200.

In determining whether the presentation, under section 125, of bills that have passed the houses to the executive requires their proffer or delivery to him *in person*, or whether the constitutional prescription is met by the lodgment of bills that have passed the houses in the executive office, *and* with a member or members of the executive secretarial force, it is the duty of the court, called to construe and to interpret and to give effect to the constitutional requirement of such long existence and obligation, to advise itself of the practice pursued by those departments of the government in respect of the transmission of bills to the executive.

Besides numerous persons who have served in the legislative department, and who have been long familiar with the process of transmission of bills to the executive, our citizenship at this time numbers five former executives of the state, viz., Hon. Rufus W. Cobb, Thomas G. Jones, Joseph F. Johnston, William D. Jelks, and Braxton B. Comer, who, with the present executive, Hon. Emmet O'Neal, are peculiarly favored to speak, and that with every assurance of the utmost

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credibility, with reference to the practice of the presentation of bills for executive consideration, and so for periods, though disconnected prior to 1896, beginning in 1878 and extending to the adjournment of the Legislature in 1911, covering approximately 20 years of the life of the state. One of these eminent citizens, Hon. Thomas G. Jones, was a member of the convention which wrote the present Constitution, and chairman of the committee reporting section 125, among others, of that instrument. From these sources, together with such pertinent and reliable documentary matter as may be available to satisfy the judicial mind, should this court seek for information as to the practice in respect of the presentation of bills to the executive consideration.

If, as the writer is advised, the long-recognized general practice in the premises has been to lodge bills that have passed the houses in the executive office with one or more of his official force, its receipt and the date thereof being noted by the receiving official upon the enrolled bill, or entered in a book kept for that purpose, or both being done, and no practice to the contrary is discoverable, the plain duty of this court appears; and that is to accept the interpretation of the constitutional provision that has thus long prevailed and hence pronounce such a lodgment of a bill in the executive office, with his official force, a valid presentation, within the Constitution, squaring with the obviously sound and immediately authoritative ruling made in the comparatively recent decision of *State ex rel. v. Porter*, 145 Ala. 541, 547, 40 South. 144, 145, where it is said, Justice ANDERSON writing: "The law provides that the petition must be *presented* to the Governor, meaning that it must be lodged with him *or his official force in some formal manner, so as to become an official document.*"

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(Italics supplied.) In that instance, the personal, non-delegable, judgment of the executive on the matter of the petition was the law's prescription, just as, in the performance of his constitutional function with respect to the making of laws, the executive personally must determine the matters within his prerogative.

If "presented," in section 125, is interpreted to mean and require the proffer or delivery of the bills to the executive *in person*, patently no statute can be *constitutionally* enacted that would or could permit the presentation of bills other than to the executive *in person*. So that the consequence of that conclusion upon the meaning of "presented," in section 125, cannot be qualified or temporarily avoided by recourse to or hope for legislative relief from the condition thus wrought; nor could the executive delegate to one or more of his official force the power to accept, in his stead, presentations of bills that have passed the houses.

The meaning and effect of the constitutional requirement for the *presentation* of bills to the executive, and when there has been such *presentation* as the organic law contemplates, was considered, in 1864 in the opinion of the justices on the constitutional validity of the *soldiers' voting bill*, 45 N. H. 607, 611, 612. One of the concrete questions propounded to the justices was this, "(3) When was said bill presented to the Governor?" Treating the inquiries submitted "as upon a case stated," the opinion thus rehearses the facts assumed to be established: "That said bill originated in the House of Representatives, passed both branches of the Legislature, was duly engrossed, signed by the presiding officers of both branches, and about noon on Wednesday, August 17, 1864, was carried by the assistant clerk of the Senate to the executive chamber, in the state house, in accordance with the customary mode of presenting

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bills to the Governor, and was laid upon the table of the Governor, who was then absent from the room, but who had been there during the morning, and was expected to return that afternoon, but did not; that when said bill was thus laid upon the Governor's table some members of the executive council were present, and also Mr. Barrett, the State Auditor, who was the son-in-law of the Governor, and who had a table there in the executive chamber for the transaction of his business, near that of the Governor; that the assistant clerk of the Senate, when he entered the executive chamber with said bill, announced that he had a bill for the Governor; that the Governor saw said bill on Thursday, August 18th, when he came into the executive chamber and found it upon his table there; that both houses adjourned from Saturday, the 20th, to Tuesday, the 23d, of August, and were not in session on Monday, August 22d; that, on Wednesday, August 24th, in the afternoon, the Governor sent a message to the House of Representatives by Mr. Sinclair, a member of said House, who gave notice to the speaker, in the House, when in session, that he had a message from the Governor to present; that the Speaker declined to receive it from him; that said message was not received by any action of the Speaker or of the House, and was not read in their hearing, but that, near the close of the session that afternoon, while the yeas and nays were being taken on a motion to adjourn, which was decided in the affirmative, the Secretary of State laid said message on the Speaker's table, stating it to be a message from his excellency, the Governor; that this message was not opened or read in the House, but was afterwards, on a subsequent day, referred to a select committee; and that in this message of the Governor he stated his objections to the bill in question, and returned said bill therewith to the House."

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The constitutional provision [part 2, art. 43] involved was as follows: "Every bill which shall have passed both houses of the General Court, shall, before it becomes a law, be presented to the Governor. If he approve, he shall sign it; but if not, he shall return it, with his objections, to that house in which it shall have originated. * * * If any bill shall not be returned by the Governor within five days (Sundays excepted) after it shall have been presented to him, the same shall be a law in like manner as if he had signed it, unless the Legislature, by their adjournment, prevent its return, in which case it shall not be a law."

It thus plainly appears that a vital factor to proper response to the inquiries submitted, specially that quoted above, was the determination whether the *presentation* required was a proffer or delivery of the bill to the Governor *in person*, the facts showing that the bill did not come to the Governor's *personal* notice or attention until *August 18, 1864*; whereas, the bill was transmitted on August 17, 1864, to the Governor's office and "*laid upon the table of the Governor, who was then absent from the room,*" not returning thereto, as had been expected.

The justices ruled that the bill was presented on August 17, 1864; whereas, had a presentation to the executive *in person* been the mandate of the organic law, the bill there under consideration would have been held *not presented* until August 18, 1864, the day and date the executive saw the bill. It was there said: "But it would be absurd to hold that the officers of the Senate and House of Representatives are obliged, in order to perform their duty, to follow the Governor wherever he may chance to go, whether in the state or out of it, upon his private business as well as public, and present bills to him *in person*, wherever he may happen to be."

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It is common knowledge that this state provides offices for its executive in the state house. The laws provide for a messenger to the "chief executive office," and for servants for the executive offices at the capitol.—Code, §§ 561, 563. A private secretary and a recording secretary are also provided for.—Code, §§ 555, 556. Indeed, every convenience for the consideration and dispatch of the public business with which the executive may be concerned is afforded at and for the office of the executive in the state house. There is universal public acquaintance with the fact that quarters and the official force of the executive are in the state house. It is just as universally known and expected that the executive quarters is the place at which it is the duty and practice of the executive to attend and consider his public duties. These matters of general knowledge underlie and support the conclusion with respect to the sufficiency of presentation which is before quoted from *State ex rel. v. Porter*, 145 Ala. 547, 40 South. 144.

The wholesomeness and rationality of this view of the constitutional requirement for the presentation of bills to the executive invited and received the approval of the Supreme Court of Louisiana, in *State ex rel. Michel*, 52 La. Ann. 936, 27 South. 565, 48 L. R. A. 218, 78 Am. St. Rep. 364. The headnotes of the decision were prepared by Justice Blanchard, who wrote the opinion for the court. As is perfectly apparent from the opinion, it was not only proper but necessary that the constitutional provision of that state, with respect to presentation of bills to the executive, should be construed. The first headnote is as follows: "(1) A bill which has passed both houses of the General Assembly, and been signed by the presiding officers thereof, is presented to the Governor, within the meaning of the Constitution, when the clerk of the House of Representa-

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tives or secretary of the Senate carries the same to the executive office, and offers or tenders it to the Governor or *his secretary*." (Italics supplied.)

The reasoning of the court in that case aptly demonstrates that, if a *presentation* to the executive *in person* was affirmed as the constitutional mandate, the executive would be vested with the power, if he remained within the commonwealth (Const., § 128), to defeat, by absence from his office, or otherwise the presentation of bills to him, and thereby render wholly vain legislative work.

In the opinion of the Justices of Massachusetts (99 Mass. 636-638), the pertinent section of the Constitution of that state was construed as requiring that bills that have passed "must" to become law, "*be laid before the Governor personally*." The constitutional provision there construed provided "that no bill shall become a law, and have force as such, *until it shall have been laid before the Governor for his revision*, * * * and in order to prevent unnecessary delays, if any bill shall not be returned by the Governor, within five days after it shall have been *presented*, the same shall have the force of law." (Italics supplied.) That provision was, as appears, not the counterpart of ours; for the presentation latterly mentioned in the organic law of that state was colored *in meaning and effect* by the preceding requirement that bills, to become law, should be *laid before the Governor*. And the response given by the justices appears not to have taken account of a long-recognized practice, by the departments concerned, of lodging bills with the executive secretarial force in the executive office.—*State v. South Norwalk*, 77 Conn. 257, 264, 58 Atl. 759.

What the view of the justices would have been, had the practice indicated long prevailed under that provis-

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ion of that Constitution, and then the reordination thereof effected in a later organic law, cannot be discovered in their opinion. In short, the question determined there had not the factors of constitutional terms and long-recognized practice and of reordination of those terms that must be considered by this court in this instance. On the concrete question propounded to them, viz., whether presentation to an "independent officer" (Secretary of State) was a compliance with the constitutional mandate there to be interpreted, there could be no real room for argument or doubt.

In *State v. South Norwalk, supra*, treating a constitutional provision very similar to our own, with respect to presentation of bills to the executive, the court said: "It cannot be deemed to have been presented to him until it has been in some way put into his custody, or into that of some one properly representing him, in such manner that he has reasonable opportunity to inspect and consider it." The court then alludes to the statutory provision made, soon after the Constitution was adopted, for the proper presentation to the Governor at the executive offices during sessions of the General Assembly. This legislative action was interpretative only; for, if the organic law required a personal presentation to the Governor, the lawmakers were powerless to alter the requirement, so as to allow the presentation to a representative of the Governor. The statutory interpretation in that instance should not be more forceful or valuable in aid of correct construction than the long practice in this state, to which allusion had been made.

In the light of these considerations, weighed with that caution with which courts of last resort wisely proceed when invoked to interpret a provision of the organic law to an effect materially different from that great de-

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partments of the government have long attributed to, and executed it, the conclusion would seem to be unescapable that the quoted, pertinent, pronouncement of *State ex rel. v. Porter, supra*, expresses the meaning and effect of "presented," as that term appears in section 123 of the Constitution.

Was House Bill 323 *presented* to the executive; and, if so, when?

By the Act approved February 22, 1866 (Acts 1865-66, p. 88), provision was made for, among others, the compensation of these "officers in the executive departments of the state," viz., "private secretary of the Governor" and "recording secretary of the Governor." These positions appear to have had statutory recognition ever since, being provided for at this time by Code 1907, §§ 555, 556. These constitute the strictly secretarial force of the executive office. The selection of the person to serve in each of these places is committed to the executive, who, it is provided, may *employ* them, and may *discontinue* their services, in his discretion.—Section 557. They have no fixed tenure. They serve at the pleasure of the executive engaging them. Some of the duties of the private secretary of the executive are prescribed by statutes. Those of the recording secretary are not particularly prescribed by statute. "A secretary is an official scribe; an amanuensis or writer; a person employed to write orders, records and the like"—and the word "secretary" is, according to proper usage, synonymous with "clerk."—7 Words and Phrases, p. 6381. From the statute-prescribed source of their selection, their unfixed tenure, and the words employed to designate them, these secretaries are obviously closely related to the person of the executive in his public service. They are his personal staff. The name "recording secretary" is indicative of the character of the service

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contemplated of performance by the person employed for that position. When coupled with "secretary," it is clear that the descriptive word "recording" intends a public servant, whose duty should be to enter or keep the record of the executive office.—*Montgomery Beer Bottling Works v. Gaston*, 126 Ala. 448, 28 South. 497, 51 L. R. A. 396, 85 Am. St. Rp. 42. Performing public duties of the gravest importance, among which are those concerning the legislative function prescribed by section 125 of the Constitution, it is apparent that the executive must have and cause to be kept records of official acts. It is inconceivable that so important a public service as the executive constantly performs could be performed without the keeping of *record thereof*. The creation, at the public expense, of the position of *recording secretary* is alone conclusive, not only of the necessity for a *record* to be kept of executive official acts, but that such a *record* is, in fact, kept by that secretary. Surely it cannot be assumed that the expense of compensating a recording secretary to the executive would be charged upon the public treasury if the service his official title suggests was not to be performed by him. It may, hence, be asserted with every assurance of correctness that the creation of a recording secretaryship is as emphatic an expression of the executive necessity and duty of the keeping of a record of his official acts, etc., as would have been a legislative command that the executive cause to be kept a general record of the official proceedings, as was the statutory requirement in Ohio, alluded to in *Wrede v. Richardson*, 77 Ohio St. 182, 82 N. E. 1072, 1074, 122 Am. St. Rep. 498. And consulting the relevant *custom* prevailing in the executive office, as should be done, and as was done in *Wrede v. Richardson, supra*, it is known that, in the performance of his service in the executive office, the recording

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secretary's duty and practice, under the present executive administration, was to receive bills that had passed the houses, and that were brought to the executive office for the executive consideration, and to receipt the legislative clerk or messenger therefor, and that the recording secretary kept a book in which he entered the date of such delivery of the enrolled bill to him, and that a stamp was also provided and customarily used wherewith to stamp, upon the enrolled bill itself, the fact and date of reception of the enrolled bill in the executive office. Under these circumstances, it is evident that writings made by the recording secretary, in his official capacity, are public records; and so even under strict rules of evidence, serviceable upon the trial of ordinary issues of fact, that are not to be thoughtfully doubted.

It has been suggested that a writing, to be a record and admissible in evidence, must be kept or made under statutory authority or command. Recourse to the highest authority on the subject demonstrates that such is *not* the law. "Although a book kept by a public officer is not required to be kept by any statute, yet, if it is necessary or proper and convenient to the adequate discharge of his duties, it is an official book, and admissible as such to prove the facts therein stated. So entries or indorsements which are necessary to a proper discharge of official duty are competent, though not expressly authorized or required by law."—10 Ency. of Ev. pp. 716, 717, and notes thereon; *Sandy White v. U. S.*, 164 U. S. 100, 17 Sup. Ct. 38, 41 L. Ed. 365; 1 Greenleaf, §§ 483-485; *Evanston v. Gunn*, 99 U. S. 660, 665, 25 I. Ed. 306; *Jones on Ev.* §§ 508, 509.

In *Sandy White's Appeal, supra*, one question was whether book entries made by a jailer, showing the names and dates of prisoners received and discharged,

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were admissible in evidence on the trial of the defendant, who was charged with presenting false, fictitious, and fraudulent claims against the United States. The court said: "We think no error was committed by the trial court in this ruling [i. e., in admitting in evidence the jailer's entries]. It was not necessary that a statute of Alabama should provide for the keeping of such a book. A jailer of a county jail is a public officer, and the book kept by him was one kept by him in his capacity as such officer, and because he was required so to do. Whether such duty was enjoined upon him by statute or by his superior officer in the performance of his official duty is not material. So long as he was discharging his public and official duty in keeping the book, it was sufficient. The nature of the office would seem to require it."

The rule is thus set down in *Evanston v. Gunn, supra*: "* * * Official registers or records kept by persons in public office, in which they are required, either by statute or by the nature of their office, to write down particular transactions occurring in the course of their public duties or under their personal observations, are admissible in evidence. To entitle them to admission, it is not necessary that a statute requires them to be kept. It is sufficient that they are kept in the discharge of a public duty.—1 Green. Evid. § 496. *Nor need they be kept by a public officer himself, if the entries are made under his direction by a person authorized by him.*" (Italics supplied.)

When it is remembered that the executive duties and prerogatives established by section 125 are of such grave importance in the making of laws that they are restricted, for seasonable, effectual exercise, to a stipulated period, that they are almost constantly invoked for application during a legislative session, that their

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exercise naturally involves, in the executive view, fidelity to the public policies to which he has, before the electorate, committed and obliged his administration, that the multitude of executive duties, along with those imposed by section 125, forbid even the effort to retain in memory the executive acts, much less the inception of the limitation periods stipulated in section 125, it may be said to be unimaginable that the executive functions, particularly with respect to the duties imposed by section 125, could be performed, with any approach to orderliness, without the keeping of a record thereof. The nature of the office of chief executive, and of that of its subordinate, intimately related functionary, the recording secretary, requires the keeping of records, the entry and indorsement, of official acts, and of processes leading thereto.

The like considerations and conclusions apply to a book kept by the clerk or messenger of the respective Houses, wherein the recording secretary received for bills transmitted to the executive office, in observance of the requirements, in that regard, of section 125 of the Constitution. Such a book falls within the provision of Code, § 909, which reads: "At the close of each session, the secretary of the Senate, and the clerk of the House of Representatives, and Secretary of State, must select all papers belonging to the Legislature, except such as relate to unfinished business, and deposit them in the office of the Secretary of State." Such papers are, of necessity, public documents; and their required deposit with the Secretary of State refutes the notion that such documents were or are the *mere private memoranda* of those who serve the houses in clerical capacities.—Code, §§ 909, 912. This is particularly true of the receipt book, kept by legislative officers, of bills transmitted to the executive office—an act

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(transmission) required of the Legislature in the performance of its functions under section 125 of the organic law.

The following *records*, kept or made by officials in their official capacities, show that the enrolled House Bill 323 was transmitted to the executive office on March 22, 1911, and delivered to the *recording secretary of the Governor*; (a) The receipt thereof and therefor, by the recording secretary, in the receipt book kept by the enrolling clerk of the House of Representatives of enrolled bills so transmitted, which receipt book is now deposited in the office of the Secretary of State. (b) The book kept by the recording secretary of the Governor, in which he entered the date of the receipt, by him, of the enrolled bill so transmitted from the Legislature to the executive office. (c) The following words, indorsed by the recording secretary on enrolled House Bill 323: "No. 162. Received March 22, 1911, Governor's office." The number "162" being the Governor's number. From the "record book" kept by the recording secretary (Mr. Nunnellee), he testified that the enrolled bill left the executive office March 31, 1911. The executive's message, before mentioned, with respect to House Bill 323, bears the like date; and the House Journal, as previously stated, shows that to have been the date of the *return* of the bill by the executive.

From these public records, made by public agents in the orderly process of promoting and invoking, according to constitutional mandate (section 125), the executive's legislative function in the enactment of laws, it appears with *absolute certainty* that House Bill 323 was *presented* to the executive on March 22, 1911.

The presentation on March 22, 1911, being established and effected, the constitutional limitation, within which the executive must have acted in order to avert

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the bill's becoming a law, began to run against executive action. Obviously the Legislature was powerless to suspend the running of the limitation. Aside from the recall of the bill from the executive custody and his return of the bill in accordance with that request, the only action of the Legislature by which the limitation (for executive action) could be affected was by *recessing*.

The sole effect of a recess, as plainly provided by section 125, is to add two legislative days, where return within the six-day period is prevented by *recess* of the house originating the bill. There is no semblance of warrant in the organic law for the notion that the Legislature may *suspend* the running of the limitation; it having once begun. The result necessarily is that by the very letter, expressive of the clear spirit and purpose, of the Constitution, the omission of the executive to act on the bill within the prescribed period after presentation makes it a *law*—constitutes the bill an enactment. If the Legislature might pronounce otherwise, the legislative *will*, and not the Constitution, would be supreme. If the Legislature may treat a bill presented to and retained beyond the period by the executive as still in fieri, still subject to the mold of legislation, when in record-established fact it has passed, under clear constitutional pronouncement, that stage, it cannot be said that the Constitution is the paramount law of this state. Given a presentation of a bill to the executive, which presentation has not been withdrawn by perfected recall of the bill, the constitutional limitation begins; and, if not interrupted in one of the modes thereby (section 125) prescribed, the bill becomes a *law*. To hold otherwise would subvert the organic law in respect of its plain provisions.

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The House originating Bill 323 was, as shown by its Journal, in session on March 29, 1911. March 25, 1911, was Sunday. Hence the last (sixth) day on which the executive might return House Bill 323, and thereby prevent its becoming a law as signed by the presiding officers of the houses on March 22, 1911, was March 29, 1911. Not having returned the bill till, as is shown with all certainty, March 31, 1911, the bill, as presented to him on March 22, 1911, became a law, *and so by express mandate of the organic law*.—Section 125.

The idea that the Legislature on March 31, 1911, approximately two days after House Bill 323 became a law, might or did, by necessary or reasonable implication from its unqualified action on the amendment proposed by the executive on March 31, 1911, investigate and determine conclusively that the executive return of the bill was seasonable, is, as before indicated, wholly untenable. The bill having been presented so as to require its return by the executive not later than March 29, 1911, if the Legislature had solemnly pronounced, on March 31, 1911, that the executive return was within the prescribed time, it would have been utterly vain, unless it could be affirmed that, notwithstanding constitutional limitations and mandates, the Legislature may conclusively declare that an act is a bill, *and not a law*, which in truth and fact had, *pursuant to constitutional provision*, become a *law*. The Constitution is the supreme law to all departments of our government. And it is finally accepted here “that, under our Constitution, a bill becomes a law only after it has passed through all the forms prescribed, and made necessary to give validity to legislative enactments.”—*Stein v. Leeper*, 78 Ala. 517, 521; *Jones v. Hutchinson*, 43 Ala. 721; *Moog v. Randolph*, 77 Ala. 597. Under our Constitution, that which has become a *law* cannot be

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changed or amended by legislative action taken otherwise than in the manner and according to the constitutional prescriptions for the enactment of laws, which is by bill formulated, in title and substance, as the organic law prescribes, and conformable to the rules of committee consideration and passage which that instrument particularly requires.

It has been suggested that to accept the specified *record* evidence of presentation of this bill on March 22, 1911, institutes a conflict with or contradiction by the journals of the houses. In the journals of the houses, there is no reference whatever to the matter of seasonable return of this bill by the executive. It is by attributing to more action, by the Legislature, upon the amendment proposed by the executive that the journals are said to express anything anent the seasonableness of the executive return of the bill. The journal is an official narrative of the proceedings of the respective houses.—*State ex rel. v. Greene*, 154 Ala. 249, 46 South. 268.

It is common knowledge that the executive of this state does not sit with the Legislature, and that his offices are removed from the legislative chambers. It appears, also, that the Constitution makers were particularly cognizant of these facts, since they provided for the transmission of bills that had passed the houses to the executive by such verbiage as necessarily imports the idea of his removal from the presence of the houses. The presentation of bills to the executive being, therefore, an act transpiring *outside the presence* of the houses, the *fact* thereof could have no place on the journals of the houses; and in consequence even an assertion (not here present) of the *fact* of presentation, with its date, upon the journals of the houses would be matter foreign to the journals; for the houses, unless pre-

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sentation was made in one or both of them, cannot record a *fact* occurring elsewhere. What verity or effect would or should be given the journal record of a *report*, in regular course of legislative work, by a messenger or officer of one or both of the houses, reciting that he had presented a certain bill to the executive in accordance with section 125, when that report is in conflict with executive records, would raise questions not pertinent here; for no such report appears to have been made or spread upon the journals of either house. In fact, the receipt book kept by the enrolling clerk of the House of Representatives conforms, in respect of the date of presentation of House Bill 323, to the records kept in the executive office, and to the fact of presentation indorsed on the enrolled House Bill 323.

It has been also suggested, as upon the authority of *Robertson v. State*, 130 Ala. 164, 30 South. 494, *Ex parte Howard-Harrison Iron Company*, 119 Ala. 484, 24 South. 516, 72 Am. St. Rep. 928, and *Montgomery B. B. Works v. Gaston*, 126 Ala. 425, 28 South. 497, 51 L. R. A. 396, 85 Am. St. Rep. 42, that the act as promulgated, coming as it does from the custody of the proper custodian of enactments of this state, its journal history fair, and bearing the approving signature of the executive, must be finally accepted by the courts as duly enacted in all particulars; fraud or forgery not being shown in respect to it. None of these decisions should or do control the conclusion on the question here involved. In *Ex parte Howard-Harrison Iron Company*, the question was whether the bill approved by the executive was the bill, not materially variant from the bill, passed by the houses. It was ruled that the presumption favored their identity; and that that presumption could only be overcome by the journals kept by the houses. Obviously that ruling was sound; for the

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highest and only evidence of what bill the houses passed were the journals thereof.

In *Montgomery B. B. Works v. Gaston*, the contest invoked the decision of the question whether the houses passed or adopted the *same bill*. It was necessary, in determining this question, to ascertain what was the journal; whether it was the loose *memoranda* kept by the clerks, or the compiled and bound volume. It was held that the bound volume was the journal; and, consulting it as the conclusive evidence of legislative action by the houses, the view prevailed that therefrom it appeared that the lower house had not adopted the Senate amendments, and thereby, as of course, leading to the constitutional invalidity of the enactment.

In *Robertson v. State*, these objections, as leading to constitutional invalidity, were asserted: (1) That the act was "wholly changed in its title and purpose during its passage through the" lower house; (2) that it was not read on three different days in either of the houses; (3) that it was not signed by the Speaker, its signature being by the Speaker pro tempore, Mr. Tunstall; the Speaker, Mr. Pettus, being ill at the time. The court held the act valid, and so in respect to the objections other than the last (third), upon the authority of the mentioned two decisions in 119 Ala. 484, 24 South. 516, 72 Am. St. Rep. 928, and 126 Ala. 425, 28 South. 497, 51 L. R. A. 396, 85 Am. St. Rep. 42.

In these cases, presenting the questions stated, it cannot be that this court ruled or intended to rule that matters necessarily and invariably, according to common and judicial knowledge, occurring in the executive office, removed from the legislative chambers, could or should properly appear upon the journals. By no sort of assumption could that be affirmed of these decisions. They did not, even remotely, invite the construction of

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section 125 in the particular with which this appeal is concerned. Whether the acts there considered became *law*, under the limitations and prescriptions of section 125 for executive action, was not involved or taken into account in any way. These cases, however broad their language, are without bearing here. This doctrine is, however, too deeply imbedded in our law to be now doubted, much less disturbed: That *no bill* can become *a law* until it has been enacted according to the forms prescribed by the Constitution. Whether, in a given case, those forms have been observed is essentially a judicial question.—Author, *supra*.

When the constitutional prescriptions are such as the houses are required to observe, and their observance is shown by the *record* (the journals) thereof, the courts accept finally the assertions of that record. This according to the wholesome notion of verity with which the courts are accustomed to view the memorials of tribunals jurisdictioned to make them.

The right of the Legislature to *act upon* an amendment proposed by the executive is particularly prescribed in section 125. *The condition* to that right is the executive *return* of the bill, with his proposed amendment, within the period prescribed. The consequence of delay in this particular beyond the period is that the bill adopted by the houses, and signed by the presiding officers thereof, becomes a *law*.

The right of the executive to return a bill, with proposed amendment, depends upon his action within a prescribed period. The right of the executive to veto a bill, thereby preventing its becoming a law, unless subsequently reconsidered and passed by the houses as the organic law requires, likewise depends upon his action within the prescribed period. Each right is limited, restricted, to a definite period. Beyond that period, nei-

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ther the executive nor the Legislature has any power or authority to defer, to defeat, or to alter the legislative will as expressed in the bill presented to him, except by a new enactment. These are constitutional restraints—mandates—just as supreme and binding as any others, to be found in that instrument.

Does mere presumption (to say nothing, at this time, of the refutatory executive records to which particular reference has been made) of conformation to constitutional requirements in the enactment of laws conclude judicial inquiry, when pointedly invoked, whether the act promulgated became a *law* in consequence of observance of constitutional commands?

When, as here, the executive action or nonaction, within a constitutionally prescribed period, is the determining factor, it is obviously no answer to say that this court has given a concluding effect to the journals of the houses in respect to matters properly appearing upon them, or that it has indulged, to finality, the presumption that, though the journals are silent, the rightful processes of legislation in the *houses* were observed.

In *Sadler v. Langham*, 34 Ala. 311, 322, it was ruled that the character of the presumption, of conformation to constitutional requirements by the Legislature, in the enactment of laws, was *not conclusive*—not conclusive upon the judicial department, to which, in the division of governmental powers (the express restriction of each department to its sphere) such inquiries are committed by the organic law.—Const. §§ 42, 43.

If the stated, conclusive presumption should be accepted, it may be inquired whether those provisions of the organic law (section 125), whereby executive action is required within prescribed periods, as affecting the enactment of laws, are not bereft of any means or tribunal for their enforcement, or of any force in the con-

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stitutional methods for the enactment of laws; whether the stated presumption has not stricken from the organic law these limitations and prescriptions, even the pronouncement that a bill, not seasonably *returned*, "shall become a law in like manner as if he had signed it?"

If a promulgated bill, apparently valid, is assailed for fraud or forgery in respect of executive action thereupon, would the presumption stated shield it from judicial inquiry in the premises? If it would *not*, it may be inquired whether the nonobservance of clear constitutional mandates is not as fatal to *valid* legislation as the grave wrongs of the class to which fraud and forgery belong? If a litigant may, in promotion or defense of a right, say, "the executive did not sign, approve, that bill, though his name appears thereto," ought another litigant, in promotion or defense of his right, be permitted to assert and show, by public records kept, in regular course, in the executive office, that the executive delayed his return or veto of the bill until the *Constitution* pronounced it a law "in like manner as if he had signed it?"

In this instance, relator contends that the *presented* (on March 22, 1911) bill became and is the law; while, on the other hand, the respondents assert that the bill, with the amendment proposed by the executive, became and is the law. The former's insistence is justified by the *public records* of the executive office and that kept by the enrolling clerk of the House of Representatives; the bill, signed by the presiding officers of the houses on March 22, 1911, not having been *returned* by the executive within the period prescribed by the Constitution, became a law under the express mandate of the Constitution. Such being the case, the amendment proposed by the executive on March 31, 1911, and adopted by the

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houses, never had the force of law; the orderly processes for the amendment or change of that which was already a *law* not having been conformed to in the adoption of the amendment so proposed by the executive.

The opinion is therefore entertained that the respondents were not and are not lawfully constituted commissioners of the city of Montgomery; that their appointments were and are without the sanction or authority of law, and hence were void.

Jordan *v.* Jordan.

Mandamus.

(Decided January 18, 1912. 57 South. 436.)

1. *Divorce; Appeal; Decisions Reviewable.*—An order made in an action for divorce denying a motion to require the complainant to pay the costs of the previous suits as a condition precedent to the prosecution of the suit, and granting complainant's petition for alimony pendente lite, and ordering a reference to ascertain the amount thereof will not support an appeal.

2. *Name; Alimony; Discretion of Court.*—The allowance to complainant of alimony pendente lite in a second suit without first requiring complainant to pay the costs of the former suit, was within the discretion of the court, especially where the plaintiff alleged that the former suit for divorce and alimony was dismissed on respondent's solicitation to effect a reconciliation, defendant agreeing to provide for her and that they should live together, and that after the dismissal of the suit defendant failed and refused to carry out his agreement.

3. *Name; Appeal; Review.*—Where counsel for defendant had notice of the time and place for the execution of the reference as to alimony and failed to appear, defendant could not except to the confirmation of the report.

4. *Judgment; Pleading in Bar.*—In an action for divorce the defense of a bar by a former action should be invoked by proper plea and not by motion.

5. *Costs; Payment; Stay of Subsequent Action.*—While the general rule is that a complainant who has failed in one suit and brings another against the same party for substantially the same cause of action, will be stayed in the second suit until the costs of the former suit are paid, the courts have some discretion in the

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matter, and if there is a valid excuse for a failure to pay the costs of the former suit, the courts will not compel such payment as a condition precedent to permitting the second to proceed.

6. *Mandamus; Alimony; Vacation of Decree.*—Mandamus is the proper remedy to require the lower court to stay proceedings in a divorce action until complainant pays the costs of previous suit, and also to show cause why the order denying the alimony should not be vacated.

APPEAL from Jefferson Circuit Court.

Heard before Hon. E. C. CROWE.

Mandamus by John J. Jordan, defendant-appellant in an action for divorce brought by Annie Jordan, praying in the alternative that, upon denial of a motion to require the adverse party to pay costs of previous suits as a condition precedent to prosecution and to vacate allowance of alimony pendente lite, to require the Jefferson circuit court to stay proceedings until payment of costs, and to show cause why the order allowing alimony should not be vacated. Appeal dismissed, and mandamus denied.

PINKNEY SCOTT, for appellant. The dismissal of the first suit was equivalent to a hearing on the merits and an end of the litigation.—Rule 28, Ch. Pr.; *Strange v. Moog*, 72 Ala. 460. The motion of the appellant then should have been granted.—*Burgess v. A. M. Co.*, 119 Ala. 669, and authorities supra. Both suits were filed in the same cause of action against the same party, and a stay of proceedings should have been had until the costs in the former suit were paid.—*Hamilton v. Maxwell*, 119 Ala. 25; *Ex parte Street*, 106 Ala. 107; *Ex parte Sherror*, 92 Ala. 596. If it be said that an appeal will not lie from these orders, then the alternate writ of mandamus, which is also prayed, is the proper remedy.—*Ex parte Jones*, 55 South. 491; *Brady v. Brady*, 144 Ala. 414.

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J. B. AIRD, for appellee. The orders here complained of are not final decrees or such interlocutory orders as will support an appeal under the statute.—Sects. 2837-8, Code 1907; *Mabry v. Dickens*, 31 Ala. 243; *Davis v. Yoe*, 43 Ala. 692; *Nabors v. Morris*, 103 Ala. 544; *McKleroy v. Gadsden*, 126 Ala. 190; *Brady v. Brady*, 144 Ala. 419; *Sumter v. Hill*, 157 Ala. 233. Counsel discusses the right to alimony pendente lite with citation of authority not necessary to be here set out. Counsel also insists that the requirement of payment of cost of former suit as a condition precedent was within the discretion of the trial court and that it was properly exercised in this case.—*Ex parte Colley*, 140 Ala. 195; *Ex parte Haynes*, 92 Ala. 120.

ANDERSON, J.—This appeal seems to be prosecuted from the action of the court in failing to sustain the appellant's motion to require the complainant to pay the costs of the previous suits as a condition precedent to a prosecution of the case at bar, and to the granting of the complainant's petition for alimony pendente lite, and in ordering a reference to ascertain the amount. None of these orders are appealable.—*Brady v. Brady*, 144 Ala. 414, 39 South. 237.

The appellant has, however, prayed in the alternative in a motion for the writ of mandamus to be addressed to the lower court requiring it to stay the proceedings until the cost is paid and to show cause why the order allowing alimony should not be vacated, and mandamus is no doubt the proper remedy.—*Brady v. Brady, supra*; *Bradshaw's Case*, 174 Ala. 243, 57 South. 16.

Regardless of the rule as to actions at law, it is well settled in equity that when the complainant, as here, has failed in one suit, and brings another against the same party for the same, or what is substantially the

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same cause of action, the court will stay the proceedings in the second until the costs in the former suit are paid.—*Street's Case*, 106 Ala. 102, 17 South. 779; *Brown v. Brown*, 81 Ala. 508, 2 South. 95. Whether or not it is the imperative duty of the court to stay the proceedings and the matter is not therefore discretionary in actions at law we need not decide. In equity, however, the rule has its limitations, and it would seem that the chancery court would have some discretion in the matter, if a proper excuse is shown.—*Updike v. Bartles*, 13 N. J. Eq. 231. “A court of equity will be governed by the circumstances of each case, and, where there is a valid excuse given for the failure to pay the cost incurred in the former action, it will not compel such payment as a condition of permitting the second to proceed.”—*N. P. Co. v. Mertes*, 35 Nev. 207, 52 N. W. 1100. In *Stebbins v. Grant*, 19 Johns. (N. Y.) 196, the court recognized the rule at common law, but refused to apply it in equity.

We cannot put the trial court in error for declining to stay the proceedings until the cost in the former suit was paid. The complainant answered the motion under oath, that the former suit was dismissed by her without seeing her counsel, upon the solicitation of the respondent, for the sole purpose of effecting a reconciliation; “that, if she dismissed the pending suit, he would provide for her, and give her money to live on, and that they would go back together as man and wife,” and, after she had dismissed said suit, he flatly refused to carry out his promise. This answer was sworn to, and we are not inclined to put the trial court in error for proceeding to award the complainant alimony pendente lite without first requiring her to pay the costs of the former suit.

The record shows that the respondent's counsel had notice of the time and place for the execution of the

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reference, and failed to appear. The respondent, having failed to appear before the register or master, could not except to the report, and which said report was properly confirmed when read.

Whether or not the former suit was a bar to the present suit, the case not having been disposed of after being set down for the hearing on its merits, or because dismissed at the instance or request of the respondent, we need not decide, for, if it is a bar, a question extremely doubtful, the defense should be properly invoked by a plea, and not by the motion in question.

The appeal is dismissed, and the manudamus must be denied. All the Justices concur, except DOWDELL, C. J., not sitting.

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Injunction.

(Decided April 18, 1905. 39 South. 167.)

1. *Counties; Bonds; Warrant.*—The issuance of interest bearing warrants on a county treasurer payable at stated times in the future for the amount of a debt contracted for the building of a court house, is not the issuance of bonds within the purview of section 222 of the Constitution of 1901.

2. *Same; Court House Contract; Validity.*—The court of county commissioners have exclusive power to determine the necessity for the erection of a new court house, and when free from fraud or corruption, their acts in that respect cannot be controlled by any judicial tribunal.

3. *Same; Special Tax.*—A contract for the erection of a court house will not be decreed invalid, and its execution enjoined on the ground that the action of the commissioner's court in levying a special tax for a number of years in the future to meet the warrants issued to pay for same was improper and invalid, conceding that the special tax should be made from year to year, and not for a number of years in the future.

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4. *Same; Claims; Auditing.*—The board did not abdicate its power to audit claims against the county by entering into a contract for the erection of a courthouse according to certain plans and specifications, under the direction of a competent architect, to be paid for only after final inspection, as the requisite auditing was done when the court considered and determined what the county should pay for the erection of certain material according to certain plans and within a certain time.

APPEAL from Jackson Chancery Court.

Heard before Hon. WILLIAM H. SIMPSON.

Bill by W. J. Talley and others against the court of county commissioners of Jackson county and others. From a judgment dismissing the bill, complainants appeal. Affirmed.

It was averred in the bill that the court of county commissioners of Jackson county had made a contract w'th the defendants Dobson & Bynum, and another contract with B. B. Smith, providing for plans and specifications for a new courthouse, to be erected at the county seat of Jackson county, on the site of the old courthouse, and for the construction of said courthouse. Both of these contracts were made exhibits to the bill.

It was further averred in the bill that each of said contracts was void, because they were signed by only three of the four members of the court of county commissioners, the other member of said court refusing to sign said contracts; that under the contract of Dobson & Bynum the court of county commissioners attempted to bind and obligate the county of Jackson to pay to Dobson & Bynum the sum of \$35,000 for the construction and erection of the said courthouse; that the sum so agreed on was excessive, and beyond any fair and reasonable price therefor; that the complainants had had no opportunity of examining the plans and specifications prepared by defendant B. B. Smith for said courthouse, but from what they could ascertain with reference to said plans the price of \$35,000 was exces-

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sive, and that from the knowledge which they had acquired from the plans and specifications the said courthouse could be erected and constructed for a sum not exceeding \$25,000; and that in adopting the plans and specifications furnished by the said B. B. Smith, the commissioners advertised for no bids, and in entering into the contract with Dobson & Bynum they advertised for no bids. It was then further averred that under the terms of said contract with Dobson & Bynum the court of county commissioners stipulated for the issuance of county warrants payable in amounts of \$500 each, and to be issued in certain amounts annually throughout a term of 12 years from the date of such warrants; that each of said warrants was to bear interest at the rate of 6 per cent. per annum, as was evidenced by coupons attached to each of said warrants; that the action of said court of county commissioners in contracting for the issuance of said warrants was illegal and void, in that said commissioners had no authority to issue its warrants upon the county treasurer, except for existing liability and upon funds in the treasury of said county; that said contract for the issuance of said warrants was a subterfuge to cover the illegal action of said court of county commissioners in issuing the bonds by said county, which was contrary to the law and statute as then existing; that as matter of fact the said warrants were nothing more than bonds, and therefore illegal and void. It was then further averred that by order of the said court of county commissioners an attempt was made to levy a special tax of 10 per cent. on each \$100 worth of property situated in said county of Jackson for the years 1905 to 1916, both inclusive; that said action or order on the part of the court of county commissioners was illegal and void, for the reason that said county was

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without authority to levy a special tax for the payment of said obligation to Dobson & Bynum for more than one year, and for the further reason that at the time of levying said tax there had previously been levied a special tax of one-tenth of 1 per cent. for building bridges in said county, and also a special tax of one-tenth of 1 per cent. for the payment of annual interest on county bonds, theretofore issued for the building and construction of public roads, which said levies of taxes were operative and in force at the time of the attempted levy of the special courthouse tax. The proceedings and orders of the court of county commissioners with reference to the making of the contracts above referred to, the authorizing of the issuance of county warrants, and the levy of the special tax were made exhibits to the bill. The prayer of the bill was that the said contracts purporting to have been issued by the said court of county commissioners to the said Dobson & Bynum and B. B. Smith be declared null and void; that the court of county commissioners and each of the defendants be restrained and enjoined from the execution and carrying out of said contract, and be restrained from tearing down the old courthouse and erecting a new courthouse; that the special tax levy from the years 1905 to the year 1916, both inclusive, be declared null and void; that the court of county commissioners and the members of said court be enjoined and restrained from issuing to Dobson & Bynum the obligations of said county, called "warrants"; and that the order of the court of county commissioners providing for the issuance of said warrants be declared null and void. There was also a prayer for general relief. Upon the filing of the bill and the execution of the bond as provided by law, a temporary injunction was issued in accordance with the prayer of the bill. The defend-

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ants demurred to the bill upon many grounds, setting up in various ways that the bill was without equity; that there were no facts averred showing any fraud, corruption, or unfair dealing on the part of the court of county commissioners; that there were no facts averred in the said bill that showed that the court of county commissioners was without authority to enter into said contracts and to authorize the issuance of the warrants and the levy of the special tax. The defendants also moved to dismiss the bill for want of equity, and filed a separate motion to dissolve the injunction for want of equity in the bill. Upon the submission of the cause upon the demurrer and motions, the chancellor rendered a decree sustaining the demurrer in each of said motions, and ordered the bill dismissed.

COOPER & FOSTER, F. A. BOSTICK, and W. H. NORWOOD, for appellant.

JOHN B. TALLEY, VIRGIL BOULDIN, and G. W. L. SMITH, for appellee.

MCCLELLAN, C. J.—It was decided in the case of *Matkin, et al. v. Marengo County, et al.*, 137 Ala. 155, 34 South. 171, that the issuance by the authority of the commissioners' court of interest bearing warrants on the county treasurer payable at a stated time in the future—ten years in that case—for the amount of a debt contracted for the building of a courthouse was not the issuance of bonds by the county within the provisions of section 222 of the Constitution, and was within the competency of the court of county commissioners. We adhere to and reaffirm that ruling, and, applying it to the case at bar, hold that it was not necessary to the validity of the action of the commis-

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sioners' court of Jackson county, attacked here, in authorizing the issuance of interest bearing warrants payable severally at divers future dates to pay for the erection of a courthouse for the county, that it shall have been authorized by the vote prescribed by that section of the Constitution. It does not appear by the bill that the special levy of 10 cents on the \$100 worth of taxable property made by the commissioners' court for each year the warrants are to run is in excess, when taken in connection with prior special levies, of the special levies allowed for certain purposes, of which the purpose here is one, by section 215 of the Constitution.

We need not pass upon the question as to the competency of the commissioners' court, when warrants are issued payable yearly for a number of years in the future, to levy in the outset a special tax for each of such years to raise money to meet the warrants maturing each year. It may be that the special levy should be made from year to year; but that concession would not give equity to this bill. If the levy beyond the current year is invalid, the fact would afford no ground for decreeing the invalidity of the contract for the erection of the courthouse and enjoining its execution; nor would a decree annulling the levy as to the later years interfere with the carrying out of the contract, or avail complainants in any way, since the commissioners' court would have the power, and, indeed, be under the duty, to make the necessary special levy year by year. "A court of county commissioners has sole and exclusive power and authority in the matter of determining the necessity for a new courthouse for a county; * * * and, in the exercise of their discretion in such matters, their acts, when free from fraud, corruption, or (and) unfair dealing, can-

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not be questioned or controlled by any judicial tribunal."—*Matkin, et al. v. Marengo County, et al., supra*. The bill in this case makes no charge of fraud or corruption, nor of unfair dealing of a character to require the annulment of the contract. There is a general averment to the effect that the price agreed upon for the erection of the courthouse is excessive, and it is alleged that the building could be erected for \$10,000 less than the contract price of \$35,000; but the bill affirmatively shows that this is speculation on the part of the complainants, for it is further alleged that they have been unable to inspect the plans and specifications for the structure, or to submit them to other contractors or builders for estimates of the cost of the building contracted for. The negotiations were entered upon and conducted, and the contract made, much in the way pursued by the commissioners' court of Marengo county, whose contract was sustained in *Matkin's Case*, *supra*.

There is, we think, no force in the contention of the complainants that the commissioners' court by this contract abdicated its power, and sought to, or in fact did, relieve itself of the duty to audit all claims against the county so far as the contractor's claim here is concerned. The requisite auditing was done when the court considered and determined what the county should pay for the erection of certain materials according to certain plans and within a certain time of the proposed courthouse; and it only remained for the court to see to it that the building should be erected in accordance with the plains and specifications. To this end the contract makes provisions such as are usual and necessary in such contracts for the supervision and reports and estimates of a competent architect, and for the

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final inspection before full payment and acceptance of the court itself.

We concur with the chancellor that the bill is without equity, and the decree dismissing it out of court must be affirmed.

Affirmed.

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Redemption of Land From Mortgage Foreclosure Sale.

(Decided February 6, 1912. 57 South. 719.)

1. Mortgages; Redemption From Foreclosure Sale; Service of Demand.—The written demand required by section 5747, Code 1907, to be served on the debtor or one holding by privity must be served on the debtor or his holder to bar the right to redeem; the mere reading to him of an alleged written demand not being sufficient.

2. Same; Waiver.—The refusal of a debtor to deliver possession of land to the purchaser at mortgage foreclosure sale on the purchaser's oral demand will not constitute a waiver of a demand in writing.

APPPEAL from Coffee Chancery Court.

Heard before Hon. L. D. GARDNER.

Bill by Eula Flowers against D. C. Hutchison and others to redeem land from a mortgage foreclosure sale. From a decree ordering redemption, respondents appeal. Affirmed.

The bill was filed within the statutory period, and offers to do equity by paying the amount found due, with interest, that request had been made to ascertain the amount necessary to redeem, and the refusal to furnish it, and her inability otherwise to ascertain the amount necessary for a tender; but it is alleged that the mortgage contained usury, and that the same should be deducted from the principal. The defense was that

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after the sale under the mortgage written demand was made upon complainant for possession of the land, and that respondent declined within a reasonable time thereafter to deliver possession to the purchasers at such sale. The evidence as to this matter sufficiently appears in the opinion.

J. F. SANDERS, for appellant. Prior to 1852, mortgagors were required to surrender possession without suit.—Clay's Dig. 502. The demand was in writing and was read to complainant and the fact that it was not left with her did not render it any less a written demand.—3 Blacks. 279; 36 Cyc. 402; 32 Cyc. 458; 36 L. R. A. 402; 22 Ia. 11; 92 Am. Dec. 350; 11 Gray 345. As bearing a close analogy to the demand here treated see the following cases as to the demand necessary under section 4897, Code 1907.—*Loeb v. Huddleston*, 105 Ala. 257; *Long v. Jennings*, 137 Ala. 190. Even if a written demand was necessary it may be waived and was waived in this case.—9 A. & E. Enc. of Law, 212, and authorities cited. The testimony sufficiently shows that a written demand was left with complainant as she had the burden to carry.—*Baker v. Birdshaw*, 132 Ala. 166. The fact of illness, etc., is no excuse.—*Burke v. Brewer*, 133 Ala. 392. There is no equity in the bill and it should be dismissed ex mero motu.—*Jackson v. Knox*, 119 Ala. 320.

E. R. BRANNAN, for appellee. The written demand was never required of the purchaser in order to shut off the statutory right of redemption until the adoption of section 5747, Code 1907, since the adoption of this section a written demand is essential and such demand must be lodged with the person to whom it is addressed.—5 A. & E. Enc. of Law, 528; 24 Ill. 192.

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Until there is a legal and statutory demand, the possession is treated as permissive.—*Baker v. Birdeshaw*, 132 Ala. 166. Where an offer to pay is refused, an actual production of the money is not necessary to constitute a tender.—126 Ala. 589.

DOWDELL, C. J.—The bill as amended, under the agreement of the parties, is confessedly one for statutory redemption of land sold under a mortgage. The real, and practically the only, question is whether or not the purchaser at the mortgage sale made a written demand for possession of the land on the mortgagor, the party in possession.

After a careful consideration of the evidence, we concur in the finding of the fact by the chancellor that the writing, which was read by one Talbot, as the agent of the purchaser, to the complainant, purporting to be a demand for possession, was not delivered to the complainant, nor a copy thereof delivered. And the question of law is: Did the reading merely of the writing, purporting to be a demand, to the party in possession, constitute a "written demand" under the statute? The present statute, section 5747 of the Code of 1907, reads as follows: "The possession of the land must be delivered to the purchaser within ten days after the sale thereof, by the debtor, if in his possession, or of any one holding under him by privity of title, if in his possession, on written demand of the purchaser or his vendee." Prior to this statute an oral or verbal demand for possession was sufficient. When we review the legislative history of the statutory right of redemption of land, the legislative intention of the importance of a written demand, as incorporated in the present statute, is not to be overlooked. The right to redeem after foreclosure was first conferred on the mortgagor

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by the Code of 1852, and in respect to the demand to be made by the purchaser for possession section 2117 of the Code of 1852 reads as follows: "The possession of the land must be delivered to the purchaser within ten days after the sale thereof, by the debtor, if in his possession, on demand of the purchaser or his vendee." The precise language of this section was carried forward in the Codes of 1867, 1876, and 1886. In the Code of 1896 the same language is used, with the following clause added: "Or of any one holding under him by privity of title, if in his possession." Section 3506. So it is to be seen, from the history of the legislation, that the requirement of the demand to be in writing was first inserted in the Code of 1907—after its having been the law for so many years that any demand, verbal or written, was sufficient to cut off this important right of redemption. The change in the law, therefore, is significant in meaning, and was intended for the benefit of the debtor, and to prevent, as far as possible, the fact of a demand from being a controverted question.

We are also of the opinion that in complying with this requirement of the statute—that is, in making a written demand—the writing should be served upon the debtor, or the person in possession, by the delivery of the writing to such person, and that a mere reading of the writing, purporting to be a demand, by the purchaser to the debtor, is not sufficient. So far as the debtor is concerned, the reading by the purchaser of what purports to be a written demand for possession of the land is nothing more than the purchaser's oral demand.

We think, however, that the demand in writing might be waived; but in such a case the waiver should be clear and unequivocal, since it involves the forfeiture

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of so important a right by the debtor. And, since the debtor is not bound on a verbal or oral demand of possession to deliver, in order to prevent a forfeiture of his statutory right to redeem, a refusal to deliver possession on oral demand should not be construed into a waiver of a demand in writing. We concur in the views of the chancellor, both as to his conclusions of the law and as to the facts in the case. It results, therefore, that the decree appealed from must be affirmed.

Affirmed. All the Justices concur.

Driver, et al. v. New.

Bill to Enjoin Trespass.

(Decided January 11, 1912. 57 South. 437.)

Injunction; Subjects; Trespass Upon Land.—While a bill to enjoin trespass cannot be substituted for ejectment, yet injunction will lie for a reasonable time to enable the parties to bring a suit at law to establish the legal title.

APPEAL from Mobile Chancery Court.

Heard before Hon. THOMAS H. SMITH.

Bill by Charley New against J. B. Driver and another, to enjoin a trespass to land. Decree for complainant and respondents appeal. Affirmed.

BESTOR, BESTOR & YOUNG, for appellant. Complainant had an adequate remedy at law and the demurrers to the bill should have been sustained. The remedy by injunction cannot be substituted for ejection or unlawful detainer, and in such law actions all damages may be recovered for.—*Cooper v. Watson*, 73 Ala. 252; *Beatty v. Brown*, 76 Ala. 267; *Kellar v. Bullington*, 101 Ala. 270; *Bolling v. Crook*, 104 Ala. 138.

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FREDERICK G. BROMBERG, for appellee. The chancellor properly granted the injunction for such a time as was necessary for appellants to institute and carry on an action of law to determine title.—*Hamilton v. Brent L. Co.*, 127 Ala. 78. Under the facts alleged the chancellor might well have made the injunction perpetual.—*Coleman, et al. v. Elliott*, 40 South. 666.

SIMPSON, J.—The bill in this case was filed by the appellee to enjoin the committing of trespasses on land, which said trespasses are alleged to be of such a continuous nature as to justify the interposition of a court of equity. It is settled that this proceeding cannot take the place of an action of ejectment, thus invoking the jurisdiction and powers of a court of chancery to decide in which party the title to land resides. The court, however, exercises its powers temporarily, enjoining the commission of the trespasses for a reasonable time, in order to enable one party or the other to bring suit in a court of law to establish his legal title.

In the case of *Kellar v. Bullington*, 101 Ala. 267, 14 South. 466, the evidence showed that the respondent was in possession of the land under color of title, and that the complainant claimed title under a government patent subsequent to respondent's entry, and this court denied the injunction, holding that it was merely a case of controversy as to the title to the land, which could not be tried in a court of equity. The court also gave as a further reason why the injunction was denied, that the value of the stone which had been and could be taken by the respondent was so inconsiderable in comparison to the vast quarry involved that no irreparable injury would follow the assertion of complainant's legal remedies without resort to injunction, and,

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quoting from High on Injunctions, said: "If the title to the locus in quo is in doubt, the injunction, if allowed at all, should only be temporary until the title can be determined at law."—101 Ala. 270, 271, 14 South. 467.

In the case of *Ashurst v. McKenzie*, 92 Ala. 484, 491, 9 South. 262, 264, this court said, "With respect to the relief sought in the bill by way of injunction of trespasses, it may be conceded that, pretermitted the question of title, the continuous or recurring character of the threatened trespasses alleged entitle the complainants to have their commission enjoined, since redress at law could only be had by a multiplicity of suits, a fact of itself sufficient to determine the inadequacy of the legal remedy, and especially so in view of the defendant's alleged and admitted insolvency," and after alluding to the fact that the matter of title was contested between the parties, and that the evidence was in irreconcilable conflict, stated that the chancery court only "conserves and protects the property by its restraining process," and that "the only relief equity can grant in the first instance is by way of temporary injunction of trespass, giving the parties opportunity to litigate the title in the courts at law," etc., and as the complainant was in possession the temporary injunction was allowed.

In the later case of *Hamilton v. Brent Lumber Co.*, 127 Ala. 78, 84, 28 South. 698, the court held that the chancellor was in error in decreeing that the complainant had the constructive possession, basing it upon "the doctrine which refers the possession to the title," because the court of equity has no jurisdiction to determine the title, yet, although there was no averment in the bill that the complainant was in possession, and no proof of possession, in him, but it was shown to the

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satisfaction of the court that the respondent was in actual possession of the land, this court rendered a decree continuing the injunction until the complainant should have a reasonable time to bring an action at law to recover possession of the land.

It seems, from these decisions of our own court, that when the title is in dispute, and the trespasses are continuous and create irreparable injury, the court will allow the temporary injunction, whether the complainant or the defendant be in possession, the object being to preserve the property until the rights of the parties can be judicially determined. The bill in this case shows the continuous and irreparable nature of the trespasses in this case, and alleges that the complainant is in possession and has title to the premises. The respondent also sets up title.

The evidence offered by complainant shows that complainant's father entered upon the land under color of title in 1870, lived on it for many years, and exercised acts of ownership, and since he moved off he and his son, the complainant, who succeeded to his father's possession under a deed, kept numerous notices of their ownership and possession at a number of places on the land, besides doing other acts indicating ownership. While there is some conflict in the evidence, we think that the chancellor correctly held that the possession of the land was in the complainant, and, under the authorities cited, properly granted the temporary injunction, until the title to the land can be determined by a proceeding at law brought within a reasonable time.

The decree of the court is affirmed.

Affirmed. All the Justices concur, save DOWDELL, C. J., not sitting.

[*Farr, et al. v. Chambless.*]**Farr, et al. v. Chambless.***Bill for Division and to Cancel Deeds.*

(Decided January 18, 1912. 57 South. 458.)

1. Deeds; Delivery; What Constitutes.—Although physical custody of the instrument is retained by the grantor a complete delivery of a deed is made by a grantor who parts with the control of the deed, or who does any act or says anything whereby he evinces an intent to part with control over it and pass it to his grantee.

2. Same; Evidence.—The evidence in this case examined and held to support a finding of a delivery of a deed.

3. Same; Incompetency of Grantor; Evidence.—An heir suing to set aside a deed of his ancestor on the grounds of insanity has the burden to show incompetency at the time of the execution of the deed, and where the evidence is about equally balanced the court will not set aside such a deed, especially where the justness of the transaction indicates a sound mind.

4. Appeal and Error; Review; Separate Assignment.—Where there is a severance in the assignment of error and error is separately assigned by those appellants prejudiced by the decree complained of, the decree will not be affirmed merely because some of the appellants are not prejudiced thereby.

APPEAL from Jackson Chancery Court.

Heard before Hon. W. H. SIMPSON.

Suit by J. L. Chambless against Martha E. Farr and others to set aside deeds and for a sale of lands for division. From a decree for complainant, defendants appeal. Reversed and rendered, dismissing complainant's bill.

The case made by the bill is that in October, 1907, one A. T. Chambless died intestate, leaving as his heirs the parties to this suit. It is alleged that there are no debts, and no need for an administration. It is further alleged that in his lifetime Chambless was seised and possessed of tracts of land (describing same), and that while so seised and possessed, in or about 1901 or 1902, he conveyed said land by deed to Martha E. Farr and

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Geneva Chambliss; but it is averred that whether the deed was ever delivered or not orators do not know, but they charge on information and belief that it was never delivered. It is further averred that, at the time of the making and signing of said deed, said A. T. Chambliss was mentally incapable of making a deed, and that at the time said deed was made Chambliss was old, was living with his daughter, and that the deed was procured by undue influence exercised over him by one of the grantees, Martha E. Farr. It is then alleged that after the preparation of that deed Geneva Chambliss died and that in 1903 Martha Farr procured Chambliss to execute an instrument in writing, in form a deed, purporting to convey to her the one-half undivided interest which he had previously conveyed to said Geneva Chambliss, and that at or about the time of the execution of said deed A. T. Chambliss and Martha E. Farr executed to George R. Chambliss a deed attempting to convey 10 acres of said land to said Chambliss off of a certain 40, and 32 acres off of another 40. It is alleged that at the time these deeds were made A. T. Chambliss was very old and infirm, and was mentally incapable of making and executing a deed, and that he was never restored to sanity, but died wholly insane. Undue influence is also alleged as having been exercised over him by Martha Farr. The prayer is for a calling in and cancellation of these deeds, and for a sale of land for division among the joint owners thereof.

VIRGIL BOULDIN, for appellant. The parent and not the child is considered the dominant party, and the law will not presume undue influence in a conveyance from the parent to the child.—*Dolberry v. Dolberry*, 153 Ala. 434; *McLeod v. McLeod*, 145 Ala. 269. Under these

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authorities the burden was on complainant to show undue influence. The deed was delivered.—*Fitzpatrick v. Brigman*, 130 Ala. 450; *Arrington v. Arrington*, 122 Ala. 510; *Strickland v. Griswold*, 149 Ala. 325. Counsel indulges in a discussion of the evidence to show that the burden was not properly carried.

W. H. NORWOOD, for appellee. Not all of the appellants were prejudiced by the decree, and therefore, it should be affirmed.—*Randolph v. Brewer*, 96 Ala. 193; *Bedell v. Mtg. Co.*, 91 Ala. 325. Where insanity is shown, it is presumed to continue, if it be general or prominent.—*Pike v. Pike*, 104 Ala. 642; *Saxon v. Whitaker*, 30 Ala. 237. Undue influence is alleged and confidential relations shown, and the burden was on the grantees to show perfect good faith.—*Couch v. Couch*, 148 Ala. 332; *Harraway v. Harraway*, 136 Ala. 586; *Walling v. Thomas*, 133 Ala. 490; *Burke v. Taylor*, 94 Ala. 530. The evidence does not disclose a delivery of the deed.

ANDERSON, J.—In the case of *Gulf Red Cedar Co. v. Crenshaw*, 169 Ala. 606, 53 South. 812, this court, in discussing what would and what would not operate as a delivery of a deed, among other things, said: “If, on the other hand, he parts with the control of the deed, or does any act, or says anything, whereby he evinces an intention to part with the dominion over it and to pass it to the grantee, though he may retain the physical custody of the instrument, or whether it be turned over to another or placed upon the record, the delivery is complete, if made with the intent that it was to so operate, and regardless of what was said and done in order to perfect same.” See also, the cases of *Fitzpatrick v. Brigman*, 130 Ala. 450, 30 South. 500; *Arring-*

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ton v. Arrington, 122 Ala. 510, 26 South. 152; *Griswold v. Griswold*, 148 Ala. 241, 42 South. 554, 121 Am. St. Rep. 64.

In the case at bar, the only positive proof of a physical delivery by A. L. Chambliss of the deeds to Martha Farr and George Chambliss is the evidence of Martha, which should probably be excluded, under the statute, as a transaction by an interested person with the deceased; but with this evidence excluded there is an abundance of legal evidence which creates a reasonable inference of the delivery of said deeds. Martha is found in possession of them, and delivered them to George to be recorded; they were duly acknowledged, and were made at or about the same time as deeds to other children, which were delivered. There was nothing clandestine about the transaction, and the deeds were made by A. L. Chambliss, pursuant to an often-repeated desire and intention to make an equitable disposition of his property between his children. He reserved a life interest in the lands deeded Martha, and attempted to deliver the deeds to his son, J. G. Chambliss, to give to Martha and George after his death, and the son gave them back to him, and told him to take them and give them to Martha. The grantor made frequent declarations in the neighborhood, and to some of his sons and sons-in-law, that he had deeded the home place to Martha and the "Jack Patch" to George, stating, in effect, that they were made in order to give them an equitable interest in his estate, as compared with what he had previously advanced the complainant, and with the property that he had deeded to, or expected to deed to, the other children, and to further compensate them for their interest in their mother's estate, which had been consumed by him in providing for some of the other children. Taking all of the facts and surround-

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ings into consideration, the most reasonable inference to be deducted therefrom is a delivery of the deeds made to Martha and George.

There was proof on the part of complainant that A. L. Chambliss was insane when the deeds were made; but the burden was on him (the complainant) to establish insanity, and while the great weight of the evidence shows that the grantor was insane at or prior to his death, the respondents' evidence shows that the said grantor's mind did not become seriously impaired until he suffered a severe spell of sickness the fall succeeding the execution of the deeds, and that he was in a sound state of mind prior to said attack, and we are inclined to accept the respondents' theory, as the burden of proof was on the complainant, and the evidence is almost equally divided. Moreover, the equity and justness of the transaction bespeak the action and thought of a sound, rather than a diseased, mind. We also think the evidence is sufficient to refute the imputation of undue influence, regardless of the age of the grantor and the fact that he resided with his daughter. The deeds operated as an equitable division of his property, with perhaps, a slight preference, as to value, in favor of his youngest daughter, with whom he resided, but which said difference in value was in a measure offset by the reservation of a life estate in the land.

It is true there is a discrepancy in the testimony of Martha as to when she gave George the deed to have recorded; but the human memory is frail and inaccurate as to exact dates, and this said discrepancy is not sufficient to overcome the reasonableness and good faith of the transaction. Nor was the refusal of George to defend the case and testify sufficient to create the inference that the deeds were falsely or surreptitiously procured from the grantor. The suit was in Jackson coun-

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ty, and as the lands are located in Marshall, George may have believed, as he contended, that the bill should have been filed where the lands were located.

It has been suggested in brief of appellee's counsel that this case must be affirmed upon the theory that some of the appellants were not prejudiced by the decree of the lower court, and in support of this contention he cites the case of *Rudulph v. Brewer*, 96 Ala. 193, 11 South. 314, and *Bedell v. Mortgage Co.*, 91 Ala. 325, 8 South. 494. These cases apply to a joint assignment of error when some of the appellants were not injured or prejudiced by the decree. In the case at bar, there is a severance in the assignment of error, and error is separately assigned by those who were prejudiced by the decree from which the appeal was taken.

The decree of the chancery court is reversed, and one is here rendered, dismissing the complainant's bill.

Reversed and rendered. All the Justices concur, except DOWDELL, C. J., not sitting.

Spiers, et al. v. Zeigler, et al.

Bill to Remove Administration and Construe a Will.

(Decided February 17, 1912. 57 South. 699.)

Wills; Construction; Administration.—Where the bill was to remove an administration from the probate to the chancery court, and to construe a will, and the bill contained a copy of the will and pointed out various matters in the will with reference to which doubt and uncertainty has arisen and sought the aid of equity to construe the will, and to direct the executors in the premises, the bill was not demurrable for want of equity.

APPEAL from Elmore Circuit Court.

Heard before Hon. W. W. PEARSON.

[*Spiers, et al. v. Zeigler, et al.*]

Bill by T. J. Zeigler and another, as executors of the last will and testament of Nancy Zeigler, against Julia E. Spiers and others, to remove the administration of the estate from the probate to the chancery court, and to constitute a will. From a decree overruling demurrers to the bill, respondents appeal. Affirmed.

The bill alleges that Nancy Zeigler died possessed of a large tract of real estate consisting of about 800 acres of land and certain personal property; that by her last will and testament she attempted to make disposition of said estate in lands and personality, but that, after executing all the directions of the will that was possible of execution, complainants had a survey made of the real estate and the same platted, with purpose of defining the boundaries between the tracts of land devised to the devisees mentioned in said will and testament, and when the same was surveyed and platted it was ascertained that it was impossible to carry into execution certain devises set forth therein, since by the description in the will several devises overlapped and certain devises bequeathed land parts of which did not belong to said Nancy Zeigler. The bill then proceeds to set forth the devises, and to show wherein they overlapped, and wherein they convey land not the property of the testator. The will is attached to the bill, and shows 11 devises of land to as many different devisees.

The demurrers to the bill are: That there is no equity in the bill. That the bill shows on its face that it was filed by the executors, and there was no provision in the will directing or instructing them, as such executors, to take charge or control of the real estate, alleged to be in possession of such respondents, or either of them. There is no authority in the will or provision of law which authorizes the executor to file any bill or obtain any decree from any court of equity affecting

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the right of possession or ownership of respondents, or either of them, to the lands which respondents, or either of them, are in possession of or claimed to own. The will shows on its face that there is no ambiguity which requires a construction of its intent by a court of equity.

GOODWYN & MCINTYRE, for appellant. The reading of the will discloses no ambiguity but is plain and unmistakable, and the court erred in overruling demurrs thereto.—Section 2621, Code 1907, and authorities cited. The judge of the 15th judicial circuit was without power to hear and determine this equity cause.—Sec. 3288, Code 1907.

FRANK W. LULL, and **COLEMAN, DENT & WEIL**, for appellee. Whenever the power of the court of probate is inadequate to grant full relief to the parties interested in an estate, resort may be had to the court of chancery.—*Sellers v. Sellers*, 35 Ala. 235; *Hooper v. Smith*, 57 Ala. 560; *Glenn's Admr. v. Billingslea*, 64 Ala. 351; *Lake View Mining & Mfg. Co. v. Hannon*, 93 Ala. 89. It is sufficient equity for the removal of an administration of an estate from the probate into the chancery court that the affairs of the estate are so greatly involved that it cannot be administered properly without the aid of a court of equity.—*Stovall v. Clay*, 108 Ala. 195; *Carey v. Simmons*, 87 Ala. 525; *Harlan v. Person*, 93 Ala. 273.

McCLELLAN, J.—The sole assignment of error is that the court erred in overruling the demurrs of Julia E. and Nancy J. Spiers. The only objections, in substance, taken by these demurrs, go to the equity of the bill, which is filed by the executors of the last will and testament of Nancy Zeigler, deceased.

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With the bill, the will, in copy, is exhibited. After most ample averments pointing out the bases of doubt and uncertainty in the provisions of the will with respect to property devised or undertaken to be devised thereby, the bill seeks the aid of equity to construe the instrument and to direct the executors in the premises. Upon the authority of *Ashurst v. Ashurst, Infra.* 57 South. 442, delivered at this term—which ruling was rested upon *Trotter v. Blocker*, 6 Port. 269; *Lakeview Co. v. Hannon*, 93 Ala. 88, 9 South. 539; *Tompkins v. Troy*, 130 Ala. 555, 30 South. 512; *Carroll v. Richardson*, 87 Ala. 605, 6 South. 342, and authorities in each cited—it must be ruled that the bill in hand possesses equity, for the removal of the administration from the probate court, and for the construction of the bill of Nancy Zeigler, deceased. It is not necessary to rehearse the evidence of complication and uncertainty which appears upon the face of the will, and to which the bill particularly refers.

The decree is affirmed.

Affirmed. All the Justices concur.

Ashurst, et al. v. Ashurst.

Bill to Remove Estate from Probate to Chancery Court.

(Decided January 9, 1912. 57 South. 442.)

1. *Appeal and Error; Who May Allege.*—Where a respondent demurs to an original bill and files a cross bill to which demurrers are interposed, such respondent cannot on an appeal from a decree overruling both demurrers complain of the overruling of the demurrers to his cross bill.

2. *Same; Questions Reviewable.*—Where the appeal is from the overruling of the demurrer to a bill to remove the administration of an estate from the probate to the chancery court for the purpose of construing a will and administering the trust therein

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provided for, the will cannot be construed, the only question for review being the propriety of the action of the lower court in overruling the demurrer; the jurisdiction of this court being wholly appellate and the chancellor being unable to construe the will until he had acquired jurisdiction, which was not given by the mere filing of the bill.

3. *Estates; Removal; Bill.*—Where a bill is filed to remove the settlement and administration of an estate from the probate to the chancery court for the purpose of construing a will and administering a trust, the mere filing of the bill did not remove the proceeding from one court to the other, but only authorized the chancery court, if the bill was sufficient, to order the removal of such proceeding, and hence, the court was not entitled to construe the will on demurrer to the bill.

4. *Same; Grounds.*—Where the assistance of the chancery court is necessary to construe a will and administer the trust therein provided for, this is sufficient grounds to authorize the removal of the administration of the estate from the probate to the chancery court.

5. *Equity; Jurisdiction; Grounds.*—Equity jurisdiction is extraordinary, and matters cognizable at law are not the subject of equity jurisdiction except when such tribunals are inadequate to grant full and complete relief.

APPEAL from Tallapoosa Chancery Court.

Heard before Hon. W. W. WHITESIDE.

Bill by Gilley D. Ashurst as executrix against Harry G. Ashurst, co-executor, and others, to remove the settlement and administration of an estate from the probate to the chancery court, in which respondents file a cross bill. From a decree overruling demurrers to the original and cross bills, respondents appeal. Affirmed.

JAMES W. STROTHER, for appellant. The court of equity will not take jurisdiction to remove an administration from the probate to the chancery court on bill filed by personal representatives unless there is special reasons therefor.—*McNeal v. McNeal*, 36 Ala. 101; *Glenn v. Billingsley*, 64 Ala. 345; *Newsome v. Thornton*, 66 Ala. 311; *Harlan v. Persons*, 93 Ala. 273; *Stovall v. Clay*, 108 Ala. 105. A court of equity will not entertain a bill which seeks only a judicial construction of

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a disputed stipulation, no element of trust appearing.—*Lakeview M. & M. Co. v. Harmon*, 93 Ala. 87; *Sellers v. Sellers*, 35 Ala. 235. Counsel discusses the proper construction to be given to the will here involved with citation of authority in support of his contentions, but in view of the opinion, it is not deemed necessary to here set them out.

THETFORD & MCKENZIE, for appellee. There is no question about the jurisdiction of the court.—*Trotter v. Blocker*, 9 Port. 269; *Harrison v. Harrison*, 9 Ala. 479; *Sellers v. Sellers*, 35 Ala. 240; *Cowles v. Pollard*, 51 Ala. 447; *Carrol v. Richardson*, 87 Ala. 605. The bill is not a contest of the will.—Authorities supra, and *Lyons v. Bradley*, 168 Ala. 505. Complainant can maintain a bill against a co-executor.—17 A. & E. Enc. of Law, 632. Counsel discuss the proper construction of the will and cite some authorities to show that the court should construe it on this appeal, but in view of the opinion it is not deemed necessary to set them out.

MAYFIELD, J.—The bill in this case is filed by an executrix to remove the settlement and administration of the estate of her testator from the probate to the chancery court. The special ground alleged for the removal is to obtain the aid and assistance of the chancery court in the construction of the will, and in the administration of the trusts necessary to a proper settlement of the estate. The respondents, some of whom are co-executors and devisees, demurred to the bill, which demurrer was overruled. The bill was subsequently amended, however, and the demurrer was interposed to the amended bill. An answer was also filed, which was made a cross-bill, and to this answer and cross-bill demurrers were interposed.

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The cause was submitted to the chancellor on demurrers only to the amended bill and to the cross-bill; and from the interlocutory decree overruling the demurrers the respondents prosecute this appeal. Of course, respondents cannot and do not complain of the overruling of the demurrer to the cross-bill.

It is earnestly insisted on this appeal by both appellants and appellee that we should so far construe the will in question as to determine whether certain clauses therein are valid or void. We cannot accede to the correctness of this proposition. Our jurisdiction in this instance is appellate only, for the purpose of reviewing the correctness of the interlocutory decree of the chancellor from which the appeal is taken. The chancellor has not yet passed upon the merits of the case; nor can we act on this appeal further than to affirm or overrule the decree rendered by him. If we affirm the decree of the chancellor overruling the demurrer, then the case will proceed on its merits and the chancellor will have to construe the will; and on an appeal from a decree construing the will, or settling the rights of the parties thereunder, we could review such decree, and, if necessary, construe the will. But we cannot construe the will on this special appeal, and any attempt to do so would not be binding on us nor the parties. The demurers to the amended bill, at most, merely tested the sufficiency of the averments of the bill as amended. The chancellor decreed only that the demurrer was not well taken, and that it was overruled. We fully concur with the chancellor, and must therefore affirm his decree.

The chancellor on that hearing was not authorized nor called upon to construe the will, but only to construe the bill. The main, if not the sole, equity of the bill, was to obtain a construction of the will by the

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chancellor. This he cannot do until he acquires jurisdiction only by the filing of a bill sufficient to confer it. The only decree so far rendered was one which, in effect, held that the bill filed was sufficient to confer jurisdiction to remove the settlement and proceedings from the probate to the chancery court. Until the proceedings are so removed, or, at least, are by a proper decree or order authorized to be removed, the chancellor has no authority to construe the will nor to authorize any proceedings in the administration of the estate. The mere filing of the bill does not remove the proceedings from the probate to the chancery court. The bill, if sufficient, merely authorizes the chancellor to order or decree the removal; and, until he does so order or decree, the matter is still in the probate court, and not in the chancery court. Thus far, in this case, there has been no order or decree of removal of the administration from the probate to the chancery court, and, until such removal order or decree is had, the chancellor cannot construe the will except in so far as it may be necessary to pass upon the equity or the sufficiency of the bill. To this extent, and for this purpose only, we will construe the will on this appeal.

In nearly all equity cases a preliminary inquiry is first to be made: Has the court jurisdiction? Is the bill or petition sufficient to authorize equitable interposition and relief? The interposition of chancery is extraordinary, and can be obtained only when the ordinary tribunals are inadequate to full and complete relief.

In the case before us the complaint sets out the will, or parts thereof, and alleges that parts of the will are involved, complicated, and that complainant is advised that parts thereof are void, and that for this reason she seeks the advice of the chancery court as to the proper

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construction of the will, and to the end that she may properly administer the trust imposed on her. As was said by this court, in the early case of *Trotter v. Blocker*, 6 Port. 269, 290: "Applications of this kind are neither novel nor unusual. It is the peculiar office of chancery to compel the performance of trusts, where trustees are either perverse or negligent. So, on the other hand, it will assist and protect trustees, in the performance of trusts, whenever they seek the aid and direction of the court, as to the establishment, management, or execution of them. This case comes clearly within the principle here stated. The bequests of the will are trusts imposed upon the executor or administrator, cum testamento annexo, and whether they are valid, and how to be performed, are questions on which the aid of the court is asked." In *Lake View Co. v. Hannon*, 93 Ala. 88, 89, 9 South. 539, STONE, C. J., quotes the rule as follows: "In 2 Pom. Eq. § 1064, it is said: 'Whenever there is any bona fide doubt as to the true meaning and intent of provisions of the instrument creating the trust, or as to the particular course which he ought to pursue, the trustee is always entitled to maintain a suit in equity, at the expense of the trust estate, and obtain a judicial construction of the instrument, and directions as to his own conduct.— 1 Pom. Eq. § 352 and note; 3 Id. § 1156; 2 Sto. Eq. Ju. § 1065 et seq. In *Bowers v. Smith*, 10 Paige (N. Y.) 193, Chancellor Walworth employed this language: 'But I am not aware of any case in which an heir at law of a testator, or a devisee, who claims a mere legal estate in the real property, where there was no trust, has been allowed to come into a court of equity for the mere purpose of obtaining a judicial construction of the provisions of the will. On the contrary, the decision of such legal questions belongs exclusively to the courts

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of law, except where they arise incidentally in this court in the exercise of its legitimate powers, or where the court has obtained jurisdiction of the case for some other purpose.' In *Bailey v. Briggs*, 56 N. Y. 407, the court, Folger, J., delivering the opinion, said: "It is when the court is moved in behalf of an executor, trustee, or cestui que trust, and to secure a correct administration of the power conferred by a will, that jurisdiction is had to give a construction to a doubtful or disputed clause in a will." Bills for this purpose have often been entertained, to the sole end of construing certain items of wills. Such bill was that in the case of *Tompkins v. Troy*, 130 Ala. 555, 30 South. 512. What was said by STONE, C. J., in the case of *Carroll v. Richardson*, 87 Ala. 605, 610, 6 South. 343 (a case much like this, and an appeal from a decree on demurrer), is, we think, conclusive of the correctness of our holding in this case. It is there said: "We hold that this bill, in each of its aspects, contains equity. The will itself, including the codicil, presents several questions of disputable solution, on which different legal minds might well differ. And it is shown that Mrs. Rothenhoffer and Carroll differ in the interpretation of the will in the assertion of the interests they severally claim thereunder. And the question may arise whether the codicil does not create a precatory trust in favor of Mrs. Kelly and Mrs. Carroll; and, on the other hand, whether the language is not too uncertain to authorize relief.—*Jones v. McPhillips*, 82 Ala. 102, 2 South. 468; 3 Pom. Eq. §§ 1156, 1157; *McRee v. Means*, 34 Ala. 349; *Hollingsworth v. Hollingsworth*, 65 Ala. 321; *Cowles v. Pollard*, 51 Ala. 445. It is not our intention to express or intimate any opinion as to the proper interpretation of any clause of the will. The question of rightful interpretation, of rightful directions, is not

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before us. The chancellor has declared no interpretation, and has given no directions. He has simply decided that the bill makes a case calling for interpretation and direction, and from that decretal order the present appeal is prosecuted. There is no error in his rulings."

We conclude that the chancellor correctly overruled the demurrer to the amended bill; and that, for the reasons before assigned, the bill contains equity.

Affirmed. All the Justices concur, save DOWDELL, C. J., not sitting.

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ADVERSE POSSESSION.

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APPEAL AND ERROR.

1. **Harmless Error.**

(a) *Evidence.*

Appeal and Error; Harmless Error; Evidence.—Where a question is asked the witness and objected to, but is not answered, the defendant has no cause of complaint.—*Adams v. The State*, 8.

Appeal and Error; Harmless Error; Evidence.—Where the value of the stock at the point of final destination was greater than

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at an intermediate point, where the conversion occurred, if at all, the admission of evidence as to the value at such point was prejudicial, especially where it appeared that the value at destination was higher than at the intermediate point, or the original point of shipment.—*No. Ry. Co. v. Wallace*, 72.

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Appeal and Error; Harmless Error; Evidence.—Overruling a valid objection to a question not answered by a witness or answered favorably to the party objecting, is not prejudicial error.—*Cooper v. Slaughter*, 211.

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Same; Evidence.—It is harmless error to permit the introduction of evidence immaterial to the issues, as a general rule.—*South. C. O. Co. v. Harris*, 323.

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Appeal and Error; Harmless Error; Evidence.—Since by the express provision of Acts 1911, p. 192, the patent to swamp lands executed by the Governor by his secretary on February 20, 1872, constitutes *prima facie* evidence of title, certified copies of entries in the books kept by the state treasury to show payments of the price of land in question by the patentee, were not prejudicial to plaintiff, as plaintiff did not rely on defendant's inability to prove payment of the purchase price of the lands to the state, and the state having the power to validate the patent upon any consideration deemed by it to be proper.—*Bruce v. McMillan*, 416.

Appeal and Error; Harmless Error; Evidence.—Where the capacity of plaintiff was otherwise shown by uncontested evidence, it is not prejudicial error to admit proceedings and a void order of a register in chancery appointing such plaintiffs as trustees, the action being ejectment by such trustees as plaintiffs.—*Busbee v. Thomas*, 423.

Appeal and Error; Harmless Error; Evidence.—It was harmless error to permit the introduction in evidence of the record of a mortgage where it was an exact duplicate of the original which was also in evidence.—*Mills v. Hudmon & Co.*, 448.

Appeal and Error; Harmless Error; Evidence.—Where the evidence of adverse possession was insufficient to establish a defendant's right to any part of the land, the improper exclusion of a deed offered by him to show his color of title was harmless.—*Brananan v. Hcnry*, 454.

(b) Pleading.

Same; Harmless Error; Pleading.—Where the defendant filed another plea under which it had the full benefit of the defense set forth in a plea to which demurrer was sustained, any error in

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sustaining such demurrer was harmless.—Birmingham Ry., L. & P. Co. v. Bush, 49.

Appal and Error; Harmless Error; Pleading.—Where defendant got the benefit, under other pleas, of the facts alleged in the plea to which demurrer was sustained, the sustaining of such demurrer was harmless.—*South. C. O. Co. v. Harris*, 323.

Appal and Error; Harmless Error; Pleading.—Where the plea could not have been amended without introducing matter wholly foreign to it as framed, so as to meet the counts to which it was filed, any error in sustaining a demurrer which did not specify the inaptness of the plea as an answer to the complaint was harmless.—*Montgomery Co. v. Prucht*, 391.

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Same.—Where a defendant appeals and assigns as error, the sustaining of a demurrer to a special plea, the burden is on him to show that he was denied the benefit of the matters set up in such plea in order to work a reversal, and hence the record need not affirmatively show that defendant actually received the benefit under the general denial of the matters specially pleaded.—*Ib.* 391.

(c) Instructions.

Same; Harmless Error; Instruction.—Where the parties by admission in open court limited the issues to the question of title, a charge relating only to the question of possession was harmless, if erroneous, especially where the jury, by their verdict disregarded the common law action.—*Cooper v. Slaughter*, 211.

Same.—Where the party complaining of the obstruction did not ask an explanatory charge, it is not error to reversal to give a charge which is not erroneous if construed in a certain way, although it might be erroneous if construed in another way.—*Ib.* 211.

Same; Instructions.—It is not reversible error to give abstract instructions unless it clearly appears that the giving of the same was prejudicial.—*Busbee v. Thomas*, 423.

Appeal and Error; Harmless Error; Instruction.—Where the instructions are conflicting, and on appeal, the court cannot know which of the instructions the jury followed, the erroneous contradiction amounts to prejudicial error.—*Christopher v. Curtis-A. L. Co.*, 484.

2. Preparation and Filing of Transcript.

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Appeal and Error; Filing Transcript; Delay; Dismissal.—Where an appeal was taken September 10, 1910, and the transcript was not filed until November 21, 1911, after the adjournment of the 1910-11 term of the Supreme Court, there was such a delay in filing the transcript as will work a dismissal of a cause on motion of appellee filed the first day it could be considered, notwithstanding that since the submission an affidavit was filed averring that the transcript

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was not received from the clerk until after the adjournment of such term of the Supreme Court.—*Nabors v. Brown*, 314.

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Appeal and Error; Dismissal; Grounds.—Where the transcript was filed during the term to which it was by law returnable, it will not be dismissed because not filed in time, in the absence of a motion to that end.—*Loucny v. Petree*, 559.

3. Review.**(a) Wrong Ground.**

Appeal and Error; Review; Wrong Grounds.—Where a plea was framed in the alternative, one alternative stating no defense, a point not taken by the demurrer, and the demurrer was sustained erroneously for the sole reason that it stated a conclusion, the defect of a bad alternative which was not relied upon cannot be taken to sustain the ruling thereon.—*Birmingham Ry., L. & P. Co. v. Bush*, 49.

(b) Pleading.

Appeal and Error; Review; Pleadings.—Where there was no demurrer to the complaint for failure to allege that the mule was of ordinary gentleness, such objection will not be considered on appeal.—*Ala. C. C. & I. Co. v. Cowden*, 108.

(c) Objections Below.

Same; Review.—Objections not taken in the court below cannot be considered on appeal.—*Cooper v. Slaughter*, 211.

Appeal and Error; Objection Below; Necessity.—An objection that evidence was a mere opinion or conclusion cannot be first asserted on appeal where the objection below was upon another ground.—*Abingdon Mills v. Grogan*, 247.

Same; Presentation Below.—Appellees cannot for the first time on appeal object to a supersedeas bond defective in such particulars, but not rendered wholly ineffectual thereby, and hence, such defects is not grounds for dismissal of the appeal, especially in view of the provisions of sections 2885-6, Code 1907.—*Birmingham T. & S. Co. v. Curry, et al*, 373.

Same.—Only those grounds of objections to pleas which were taken by demurrer in the trial court and renewed in the appellate court will be considered on appeal.—*Ib.* 373.

Appeal and Error; Review; Presentation in the Court Below.—Where information in the nature of quo warranto was to test the right of the probate judge to exercise the duties of a county judge and alleged that there was a county court, that it was a court of record and that the probate judge was ineligible to discharge the functions of that office, and the information was dismissed upon the sustaining of a demurrer thereto, the sufficiency of the information was the only question presented for review; the question of the constitutionality of the Local Act creating the county court could not be reviewed, as it was not raised in the court below, and could not be raised on appeal.—*State ex rel Vandiver v. Burke*, 561.

(d) Presumptions.

Same; Review; Presumption.—Where the demurrs which were sustained by the trial court are not set out in the record, it

APPEAL AND ERROR—*Continued.*

will be presumed on appeal that they properly stated a valid objection to the pleading, if any existed.—*Richardson v. Martins*, 309.

Appal and Error; Review; Bill of Exceptions.—Where the bill of exceptions does not purport to set out all or substantially all of the evidence, the giving of the affirmative charge was not shown to be error, the presumption being indulged that evidence was introduced by the party in whose favor the verdict was directed, not in conflict with the evidence for the other party, justifying the action of the court.—*Bcard v. DuBosc*, 411.

(e) Separate Assignments.

Appal and Error; Review; Separate Assignment.—Where there is a severance in the assignment of error and error is separately assigned by those appellants prejudiced by the decree complained of, the decree will not be affirmed merely because some of the appellants are not prejudiced thereby.—*Farr v. Chambliss*, 659.

Same; Questions Revivable.—Where the appeal is from the overruling of the demurrer to a bill to remove the administration of an estate from the probate to the chancery court for the purpose of construing a will and administering the trust therein provided for, the will cannot be construed, the only question for review being the propriety of the action of the lower court in overruling the demurrer; the jurisdiction of this court being wholly appellate and the chancellor being unable to construe the will until he had acquired jurisdiction, which was not given by the mere filing of the bill.—*Ashurst v. Ashurst*, 667.

4. Record.

(a) Questions Presented by.

Appeal and Error; Record; Questions Presented.—Where the count on which the case was tried is not disclosed by the record, this court cannot review the rulings of the trial court upon evidence and instructions relative to such count.—*Rice v. So. Ry. Co.*, 69.

5. Assignment and Waivers of.

Appeal and Error; Review; Waiver.—The mere assertion that the demurrer was improperly overruled is not such an argument on the assignment of error to the overruling of the demurrer as will prevent a waiver of the assignment.—*Richardson v. Martins*, 309.

Appeal and Error; Joint Assignment; Review.—Unless sustainable on all grounds, a joint assignment of error will be overruled.—*Continental C. Co. v. Ogburn*, 357.

Same; Assignment; Waiver.—The failure to argue or insist upon refused charges is a waiver of such assignment of error.—*Busbee, et al. v. Thomas*, 423.

5½. Who May Allege.

Appeal and Error; Who May Allege.—Where a respondent demurs to an original bill and files a cross bill to which demurrs are interposed, such respondent cannot on an appeal from a decree overruling both demurrs complain of the overruling of the demurrs to his cross bill.—*Ashurst v. Ashurst*, 667.

6. Plea—Effect of Evidence.

Same; Plea; Effect of Evidence.—The court on appeal cannot look to a plea in determining the correctness of the action of the trial court on the evidence, where such plea was not filed until after such evidence had been offered and rejected.—*South. C. O. Co. v. Harris*, 323.

APPEAL AND ERROR—Continued.**7. Judgment to Support.**

Appeal and Error; Judgment to Support; Continuance.—A party is not entitled to accept a continuance and reject the terms imposed by the court, and the imposition of costs as a condition to granting a continuance is within the irreversible discretion of the trial court, hence, the order and judgment imposing costs as a condition to a continuance will not support an appeal.—*McLaughlin v. Beyers*, 544.

ARGUMENT OF COUNSEL.

See Trial, § 4.

ARREST.

See Homicide, § 3.

Arrest; Warrant; Authority.—Where two officers are acting together in attempting to make an arrest, and the warrant is in the possession of one of them, it is a justification for both, and the act of one of the officers, who does not have the warrant in possession in going into the house of defendant to arrest him while the officer with the warrant stands nearby, is justified by the warrant; such officer must, however, inform accused of his authority and produce the warrant before making the arrest if the warrant is demanded. (Sec. 6268, Code 1907.)—*Adams v. The State*, 8.

BAIL.

Bail; Right of Accused to.—Where defendants were indicted for murder in the first degree, tried under said indictment and convicted of murder in the second degree, this was an acquittal of the higher offense, and entitled defendant to admission to bail.—*Ex parte Spivey*, 43.

BILLS OF EXCEPTIONS.**1. Signing and Withdrawing Signature.**

Bill of Exceptions; Signing; When in Fieri.—When a bill of exceptions is presented to the trial judge within 90 days after the judgment, and signed by him within 90 days, if the signing is in term time, the bill of exceptions is in fieri until the adjournment of the term; but, like other parts of the record, it cannot be altered or modified after adjournment; if it is not signed in term time, it remains in fieri until signed, or until the expiration of the period for signing or presenting has expired, but upon being signed and filed, it becomes a part of the record, and if signed after the adjournment of that term of the court, it is no longer in fieri, and cannot be changed or modified by the judge.—*Briggs v. T. C. I. & R. R. Co.*, 130.

Same; Withdrawing Signature.—Under the facts in this case, it is held that the action of the court in withdrawing its name from the bill of exceptions was subsequent to the end of the term and subsequent to the signing and filing of the same with the clerk, and hence, was unauthorized and void.—*Ib.* 130.

Bill of Exceptions; Signing; Place.—The judge of the law and equity court of Mobile had authority to sign a bill of exceptions while temporarily outside of Mobile county, in view of section 3300, Code 1907, and Acts 1907, p. 562.—*Brue v. McMillan*, 416.

BILLS OF LADING.

See Carriers, § 2.

BILLS AND NOTES.

Bills and Notes; Bona Fide Purchaser.—A purchaser of negotiable paper, in due course, before maturity, without notice of defects, for value, is a bona fide holder, and takes such paper free from defenses available between the original parties.—*Bluthenthal, et al. v. Columbia*, 398.

Same; Illegal Notes.—A note which is expressly made illegal and void by statute is void in the hands of even otherwise bona fide holders without notice of illegality; but if the statute merely, expressly or impliedly makes the consideration illegal, the note will be valid in the hands of a bona fide purchaser without notice, though the burden is upon the purchaser to show that he is a bona fide holder.—*Ib.* 398.

Same.—Where a corporation purchased from a firm composed of persons who afterwards became stockholders and officers of the corporation, a negotiable note executed by a municipality for liquors purchased for a dispensary, which note was illegal in the hands of the firm because executed in violation of the dispensary law, the corporation is not a bona fide holder without notice, knowledge of the partners being imputed to the corporation.—*Ib.* 398.

BONA FIDE PURCHASER.

See Bills and Notes.

BOUNDARIES.

Boundaries; Agreement; Mutuality.—Where plaintiff testified to the authority of her agent, and that she had ratified the agreement, such testimony established the agreement as binding on her, and the mutual promises constituting a valuable consideration, it was proper to admit in evidence an agreement between adjoining landowners, signed by defendant and by S as agent for plaintiff, by which the parties agreed that each should employ a surveyor who should jointly locate the boundary line, and that they should abide by the line so established, over the objection by defendant that it is not shown to be binding on plaintiff and that it was without consideration.—*Cooper v. Slaughter*, 211.

Same; Necessity of Writing.—The common law submission to arbitration of a disputed boundary line need not be in writing and may be made in writing by an agent, having only verbal authority.—*Ib.* 211.

Same; Evidence.—In an action involving a disputed boundary it was not error to permit a party to show an instance in which her agent objected to the presence on the disputed strip of a party who had purchased from the opposite party, as it bore on the question of possession and control.—*Ib.* 211.

Same; Maps.—It was competent to introduce in evidence maps made jointly by two surveyors selected by the parties to determine the true boundary line, since apparently, the agreement was binding, and based on mutual promises.—*Ib.* 211.

Same; Agreement.—Where the action involved a disputed boundary line and there was evidence of an agreement apparently binding on both parties to appoint surveyors and abide by their decision, it was not error to charge that if the jury believe that defendant made an agreement with plaintiff to have the line ascertained by a survey, the jury might consider the agreement in connection with the other evidence in the case to determine whether or not defendant's possession of the disputed strip had been adverse.—*Ib.* 211.

BOUNDARIES.—Continued.

Same; Instructions.—A charge asserting that if the jury believed that a boundary line was in dispute, and that the adjoining owners caused it to be established and acquiesced in the line as established, plaintiff would be deemed the owner of all lands up to such line, was correct, since the word "deemed" is equivalent to the word "presumed" and the word "acquiesce" not necessarily meaning only momentary acquiescence.—*Ib.* 211.

Boundaries; Evidence; Deeds.—Where plaintiffs in ejectment relied on an ancient deed as evidence of title, and the defendants attacked the deed for uncertainty of description, and a witness testified that he had lived in the neighborhood of the land practically all of his life, that the original trustees under whom the plaintiff claimed were in possession of the tract before the war, and that he had seen a stake at the northeast corner frequently prior to 1860, it was for the jury, under the latitude allowed in proof of ancient boundaries, to say whether or not this stake was the stake referred to in the deed.—*Busbee v. Thomas*, 423.

Same; Conflicting Elements; Quantity.—Neither weight nor effect will be given a description of a deed in terms of quantity, except for the purpose of relieving some otherwise irremediable ambiguity in the more particular description, and the specific description will control although the description by monument, corners and boundaries contains more than the amount specified by acres.—*Ib.* 423.

CHARACTER.

See *Evidence*, § 1.

CHARITIES.

Charities; Trustees; Capacity to Sue.—Where the trustees of a school bring ejectment and are shown by the minutes of the school board to have been elected as such according to the terms of the deed under which they held, that they were serving in that capacity, and had been appointed as such by a regular and valid order of a register in chancery, under sections 6098, 6099, Code 1907, they were sufficiently qualified to bring such suit for lands conveyed as a charitable donation to the trustees of the school.—*Busbee v. Thomas*, 423.

Same; Election; Collateral Attack.—Although the election of the trustees of a school may have been voidable at the instance of the cestui que trust, it was not void, and hence, could not be assailed collaterally by attacking the capacity of such trustees in an ejectment suit for property conveyed in trust for the benefit of the school.—*Ib.* 423.

Same.—Although the election of the trustees under a deed of land for the maintenance of a school was not strictly regular, yet it cannot be declared void so as to incapacitate such trustees to bring ejectment to recover the trust property, where there was no fraud, and the election had remained unquestioned for a number of years.—*Ib.* 423.

Same; Appointment.—Where the appointment of trustees under a deed to land for the maintenance of a school is neither void nor voidable their later appointment by a register in chancery under statutory regulation was void for want of jurisdiction, for, where the creator of a trust has provided a method for filling vacancies, and it is possible to so fill them, no other method is applicable, general provisions of law notwithstanding.—*Ib.* 423.

CHARGE OF COURT.

For instructions in particular actions and crimes, see that title, sub-title "Instructions."

1. Reasonable Doubt.

Charge of Court; Reasonable Doubt.—A charge asserting that while the law requires the guilt of a defendant to be proven beyond a reasonable doubt, it does not require that each fact which may aid the jury in reaching the conclusion of guilt shall be clearly proved, but that, on the whole evidence, the jury must be able to pronounce guilt beyond a reasonable doubt; and that the state is only required to prove guilt beyond a reasonable doubt; and that a doubt sufficient to acquit must be actual and substantial and not a mere possibility or speculation, was a proper presentation of the law of reasonable doubt.—*Parris v. The State*, 1.

Same; Reasonable Doubt.—A charge asserting that where there is a probability of defendant's innocence, the jury should acquit him, was improperly refused.—*Adams v. State*, 8.

Same.—It is proper to refuse a charge asserting that where the evidence is evenly balanced the jury should acquit the defendant.—*Ib. 8.*

Charge of Court; Reasonable Doubt.—A charge asserting that if one single fact was proved to the satisfaction of the jury, which is inconsistent with the guilt of defendant, it is sufficient to raise a reasonable doubt requiring acquittal should have been given.—*Roberson v. The State*, 15.

2. Singling Out Evidence.

Same; Singling Out Evidence.—Charges which single out or give particular emphasis to a portion of the evidence may be properly refused.—*Parris v. The State*, 1.

Same; Undue Prominence.—A charge asserting that the jury should consider that defendant was interested in the result and that if he was convicted, he would be punished, singled out for comment a particular matter affecting the credibility of the defendant as a witness, and was improper.—*Roberson v. State*, 15.

Charge of Court; Undue Prominence.—Although a charge asserts a correct principle of law it may be refused if it gives undue prominence to a certain portion of the evidence.—*Hanchey v. Bruns-*son, 236.

3. Form of.

Charge of Court; Form.—Charges which are elliptical, argumentative or unintelligible are properly refused.—*Parris v. The State*, 1.

4. Weight of Evidence.

Charge of Court; Weight of Testimony.—The court refused to charge that if the state witnesses had exhibited prejudice against accused and had satisfied the jury that they did not testify truly and were not worthy of belief, the jury could disregard their testimony. Held, by a divided court, that under the peculiar circumstances in this case that the charge should have been given, and that its refusal was error to reversal.—*Adams v. State*, 8.

4½. Purpose of Evidence.

Charge of Court; Purpose of Evidence.—Where evidence was admissible for a certain purpose only, a charge limiting it to that purpose should have been given on request.—*B'ham T. & S. Co. v. Curry*, 373.

CHARGE OF COURT—Continued.**5. Construction.**

Charge of Court; Instruction.—A charge must be construed as a whole and error cannot be predicated upon an excerpt thereof only.—*Ala. C. C. & I. Co. v. Coicden*, 108.

6. Abstract.

Same; Abstract.—A charge asserting that if a witness is reluctant to tell what he knows or is swift to tell it, or seems anxious to do so, juries will not have much confidence in him, was merely abstract and as the court stated that he did not say there was anything like that in this case, it was not prejudicial.—*Ala. C. C. & I. Co. v. Coicden*, 108.

Charge of Court; Abstract Instructions.—Error to reversal cannot be predicated on the giving of merely abstract instructions unless they mislead the jury to the prejudice of the party complaining.—*Robinson v. Crotwell*, 194.

7. Ignoring Issues and Evidence.

Same; Ignoring Issues.—A charge directing a verdict for defendant on one aspect of the case, and ignoring plaintiff's contention which found support in the evidence, was properly refused.—*Robinson v. Crotwell*, 194.

8. Invading Jury's Province.

Same; Invading Jury's Province.—An instruction assuming fact contrary to the evidence is properly refused for that reason.—*Robinson v. Crotwell*, 194.

Same.—An affirmative charge on the whole case is properly refused where the evidence is conflicting, although on the whole evidence, plaintiff's case is so unproven that a verdict for him could not stand.—*Ib.* 194.

9. Burden of Proof.

Same; Burden of Proof.—A charge asserting that if, after considering all the evidence, the minds of the jury remain in an unsettled state on the issue, the verdict must be for defendant, was not erroneously refused, the word "settled" implying that the mental state to which it is applied has become fixed, permanent and not subject to change.—*Robinson v. Crotwell*, 194.

10. Assuming Facts.

Charge of Court; Assumption of Fact.—Where there was no conflict in the evidence as to the fact of the purchase, the only question being as to its validity, a charge is not rendered improper in assuming that the goods had been purchased, especially where it based a finding of that fact as one of its hypotheses.—*South. C. O. Co. v. Harris*, 323.

CARRIERS.

See Railroads; Street Railways.

1. Of Goods.**(a) Stock.**

Carriers; Live Stock; Non-Delivery; Excuse.—Where a shipper contracted for the transportation of certain cattle and a horse in one car, but the shipment of the cattle was prevented by a legal quarantine, and the shipper refused to permit the horse to be shipped separately, he could not recover against the carrier, for a failure to deliver the horse at destination.—*So. Ry. Co. v. Wallace*, 72.

CARRIERS—Continued.

Same; Action; Form.—Where the carrier was unable to ship the stock to destination on account of a legal quarantine, whereupon, the carrier shipped them back to the original shipping point, and tendered them to the shipper who declined to receive them, and directed the carrier to do whatever it saw fit with them, and the carrier sold the stock, and held the money for the shipper, the shipper could not recover as for a conversion of the stock, at the original shipping point.—*Id.* 72.

Same; Right of Action.—Where stock was shipped, but on account of a legal quarantine, could not be sent through to destination, and the shipper directed that the stock be returned to the original shipping point, from an intermediate point, he was not entitled to recover from the carrier for their conversion at such intermediate point.—*Ib.* 72.

Same; Connecting Carrier; Failure to Receive; Duty of Initial Carrier.—Where a connecting carrier refuses to receive live stock, or other freight, it is the duty of the initial carrier to notify the consignor, so as to enable him to give further shipping directions, unless the freight is of such a perishable nature that it would probably be injured by taking of time necessary to give such notice.—*Id.* 72.

2. Bill of Lading.

Carriers; Loss of Goods; Bill of Lading; Issuance Before Delivery.—Before a carrier can be made liable for goods, there must be a delivery actual or constructive to the carrier. The facts of this case examined and under the rule above announced, it is held that it is not shown that the goods for whose destruction damage is sought was delivered to the carrier in such a manner as to render the carrier liable for their loss.—*Lovemore & Co. v. Ala. T. & N. Ry. Co.*, 316.

CODE SECTIONS CITED OR CONSTRUED.

Section:

10. City of Birmingham v. Crane, 90.
470. Lowery v. Petree, 559.
555. State ex rel. Crenshaw v. Joseph, 579.
556. State ex rel. Crenshaw v. Joseph, 579.
561. State ex rel. Crenshaw v. Joseph, 579.
563. State ex rel. Crenshaw v. Joseph, 579.
909. State ex rel. Crenshaw v. Joseph, 579.
1046. City of Birmingham v. Crane, 90.
1050. City of Birmingham v. Crane, 90.
1251. Sloss-S. S. & I. Co. v. Smith, 200.
1409. Draper v. State ex rel. Patillo, 547.
1470. Draper v. State ex rel. Patillo, 547.
1472. Draper v. State ex rel. Patillo, 547.
1474. Draper v. State ex rel. Patillo, 547.
2252. State v. Ide Cotton Mills, 539.
2485. City of Birmingham v. Crane, 90.
2872. Birmingham T. & S. Co. v. Curry, 373.
2873. Birmingham T. & S. Co. v. Curry, 373.
2885. Birmingham T. & S. Co. v. Curry, 373.
2886. Birmingham T. & S. Co. v. Curry, 373.
3019. Briggs v. T. C., I. & R. R. Co., 130.
3033. Woolf v. McGaugh, 299.
3300. Brue v. McMillan, 416.

CODE SECTIONS CITED OR CONSTRUED—*Continued.*

338. Birmingham T. & S. Co. v. Curry, 373.
 3341. Broom v. Douglass, 268.
 3349. Birmingham T. & S. Co. v. Curry, 373.
 3350. Birmingham T. & S. Co. v. Curry, 373.
 3351. Birmingham T. & S. Co. v. Curry, 373.
 3352. Birmingham T. & S. Co. v. Curry, 373.
 3374. McBride v. Lowe, 408.
 3426. Bruce v. Sierra, 517.
 3429. Bruce v. Sierra, 517.
 3714. Briggs v. T. C., I. & R. R. Co., 130.
 3840. Leath v. Cobia, 435.
 4844. Leath v. Cobia, 435.
 3851. Mills v. Hudmon & Co., 448.
 3889. Leath by Cobia, 435.
 3904. Leath v. Cobia, 435.
 4293. Southern C. O. Co. v. Harris, 323.
 4720. Woolf v. McGaugh, 299.
 4756. Wildman v. Evans Bros. Const. Co., 333.
 4757. Wildman v. Evans Bros. Const. Co., 333.
 4846. Richardson v. Mertins, 309.
 4860. Richardson v. Mertins, 309.
 5198. Harris v. Randolph L. Co., 148.
 5329. Baranco v. Birmingham T. Co., 146.
 5367. Baranco v. Birmingham T. Co., 146.
 5453. State ex rel. Vandiver v. Burke, 561.
 5732. Briggs v. T. C., I. & R. R. Co., 130.
 5747. Hutchison v. Flowers, 651.
 5965. Bruce v. Sierra, 517.
 6099. Bushee v. Thomas, 423.
 6110. Woolf v. McGaugh, 299.
 6174. Bruce v. Sierra, 517.
 6264. Roberson v. The State, 15.
 6264. Adams v. The State, 8.
 6268. Adams v. The State, 8.
 6269. Adams v. The State, 8.
 6473. B'ham T. & S. Co. v. Curry, 373.
 6474. B'ham T. & S. Co. v. Curry, 373.
 6475. B'ham T. & S. Co. v. Curry, 373.
 6476. B'ham T. & S. Co. v. Curry, 373.
 6477. B'ham T. & S. Co. v. Curry, 373.
 6478. B'ham T. & S. Co. v. Curry, 373.
 7087. Roberson v. The State, 15.
 7161. Ex parte Spivey, 43.
 7263. McSewan v. The State, 21.
 7264. McSewan v. The State, 21.
 7447. Draper v. State ex rel. Patillo, 547.
 7572. Parris v. The State, 1.

COLLATERAL ATTACK.

See Charities; Eminent Domain.

COMMERCE.

1. Interstate.

Commerce; Interstate; Regulation.—Acts 1907, p. 225, is violative of article 1, section 8, Constitution of United States, in so far as it may affect cars which may be needed in interstate commerce, or may be used therein, so that they cannot be supplied.—*C. of Ga. Ry. Co. v. Groesbeck*, 189.

COMMERCE.—Continued.

Same; Police Power of States.—The grant to Congress of the power to regulate interstate commerce, in the absence of action by Congress, does not deprive the states of their police power to impose reasonable regulation on interstate carriers for the protection of the lives, health and safety of the people.—*Ib.* 189.

CONSTITUTION CITED OR CONSTRUED.

Section :

- 23. *Duy v. Ala. W. Ry. Co.* 162.
- 42. *State ex rel. Crenshaw v. Joseph.* 579.
- 45. *State ex rel. Crenshaw v. Joseph,* 579.
- 45. *Brannan v. Henry,* 454.
- 95. *Brannan v. Henry,* 454.
- 125. *State ex rel. Crenshaw v. Joseph,* 579.
- 139. *State ex rel. Vandiver v. Burke,* 561.
- 154. *State ex rel. Vandiver v. Burke,* 561.
- 215. *Talley v. Com. Court,* 644.
- 222. *Talley v. Com. Court,* 644.
- 235. *Duy v. Ala. W. Ry. Co.,* 162.
- 280. *State ex rel. Vandiver v. Burke,* 561.

CONSTITUTIONAL LAW.

See Statutes.

1. Presumptions as to.

Constitutional Law; Statutes; Presumption.—The Acts of the Legislature are presumed to be constitutional until clearly shown to be unconstitutional.—*State ex rel. Vandiver v. Burke,* 561.

Same; Determination.—A statute will not be declared unconstitutional unless shown to be so beyond a reasonable doubt, and this is especially true where many similar acts have been sustained.—*Ib.* 561.

Constitutional Law; Statutes; Validity.—Appellate Courts will sustain the validity of an act unless it is clear beyond a reasonable doubt that it violates the Constitution.—*State ex rel. Crenshaw v. Joseph,* 579.

2. Special or Local Laws.

Same; Special Laws.—General Acts 1911, p. 204, General Acts 1911, p. 209, and General Acts 1911, p. 591, are separate statutes, and are not special laws within the constitutional inhibition, although referring to the same general subject, a classification based on population being reasonable.—*State ex rel. Crenshaw v. Joseph,* 579.

CONTRACTS.

See Sales.

Contracts; Construction; Written and Printed.—In construing a contract partly printed and partly written, the court should construe the whole instrument with a view of ascertaining the intention and purpose of the parties, giving to the written parts precedence over those which are printed.—*John Deere Plow Co. v. City Hdw. Co.,* 512.

CORPORATIONS.

Notice to, see Bills and Notes.

1. Liability for Torts of Agent.

Corporation; Torts; Liability; Employee.—A corporation is liable for the wrongful act of its employees done in the course of their employment or line of their duty.—*Gassenheimer v. W. Ry. of Ala.,* 319.

CRIMINAL LAW.

For particular crimes see that title.

1. Judgment and Arraignment.

Criminal Law; Judgment; Capital Case; Waiver; Special Venire.—A failure to record a waiver of a special venire in a capital case does not invalidate a conviction, as such waiver may be shown by the bench notes made by the trial judge. (Sec. 7264, Code 1907.)—*McSiccan v. State*, 21.

Same; Service of Indictment.—Where a special venire and its service has been waived by a defendant, it is not necessary that a copy of the indictment should be served upon the defendant.—*Ib.* 21.

Same; Presence of Accused; Presumption.—Where trial was begun and verdict rendered on the same day a recital in the judgment entry showing accused's presence when the trial began created a presumption that he was continuously present and was present when the verdict was received.—*Ib.* 21.

2. Former Jeopardy.

Criminal Law; Former Jeopardy; What Constitutes.—Where a defendant was indicted for murder in the first degree, tried and convicted of murder in the second degree; that conviction operated as a bar to a further prosecution for murder in the first degree, notwithstanding such conviction was reversed for error committed on the trial, in ruling on a plea, since the judgment was not invalid, but was in full force and effect until reversed; section 7160, Code 1907, comes into operation only where the judgment is arrested or indictment quashed on account of defects therein or because not found by a grand jury regularly organized.—*Ex parte Spircy*, 43.

COSTS.

Costs; Payment; Stay of Subsequent Action.—While the general rule is that a complainant who has failed in one suit and brings another against the same party for substantially the same cause of action, will be stayed in the second suit until the costs of the former suit are paid, the courts have some discretion in the matter, and if there is a valid excuse for a failure to pay the costs of the former suit, the courts will not compel such payment as a condition precedent to permitting the second to proceed.—*Jordan v. Jordan*, 640.

COUNTIES.**1. On Implied Contracts.**

Counties; Implied Contracts.—If the contract is within the range of a county's contractual powers, general assumption on an implied contract will lie against it.—*Montgomery Co. v. Prueett*, 391.

2. Bonds and Warrants.

Counties; Bonds; Warrant.—The issuance of interest bearing warrants on a county treasurer payable at stated times in the future for the amount of a debt contracted for the building of a court house, is not the issuance of bonds within the purview of section 222 of the Constitution of 1901.—*Talley v. Com. Court*, 644.

Same; Court House Contract; Validity.—The court of county commissioners have exclusive power to determine the necessity for the erection of a new court house, and when free from fraud or corruption, their acts in that respect cannot be controlled by any judicial tribunal.—*Ib.* 644.

COUNTIES—Continued.

Same; Special Tax.—A contract for the erection of a court house will not be decreed invalid, and its execution enjoined on the ground that the action of the commissioner's court in levying a special tax for a number of years in the future to meet the warrants issued to pay for same was improper and invalid, conceding that the special tax should be made from year to year, and not for a number of years in the future.—*Ib.* 644.

Same; Claims; Auditing.—The board did not abdicate its power to audit claims against the county by entering into a contract for the erection of a courthouse according to certain plans and specifications, under the direction of a competent architect, to be paid for only after final inspection, as the requisite auditing was done when the court considered and determined what the county should pay for the erection of certain material according to certain plans and within a certain time.—*Ib.* 644.

COURTS.**1. Decisions Governing.**

Courts; Decisions; Federal Question.—A decision by the Supreme Court of the United States that a state statute is an interference with interstate commerce, is binding on the state court.—*C. of Ga. Ry. Co. v. Groesbeck*, 189.

2. Jurisdiction, etc.

Courts; Jurisdiction; Excess.—Excess of jurisdiction as distinguished from want of jurisdiction means that an act is unauthorized and void with respect to a particular case, though within the general power of the court, because the condition which alone authorizes the exercise of his general power in the case, are wanting.—*Broom v. Douglass*, 268.

Same; Colorable Cause.—Colorable cause or colorable invocation of jurisdiction, when applied to the jurisdiction of an inferior court, means that some person apparently qualified to do so, has appeared before the judge and made complaint under oath, stating some facts which may, with other facts unstated, constitute a criminal offense, or stated some fact, which bears some general similitude to a fact designated by law as an offense, calling on the judge to pass on the sufficiency of the affidavit to elicit the process issued.—*Ib.* 268.

Courts; Jurisdiction; Personal Action.—In personal actions the jurisdiction depends upon the subject matter and the presence in court of the parties whose rights are to be affected by the judgment.—*Wolf v. McGaugh*, 299.

Same; Inherent Power; Subject Matter.—Since by the subject matter is meant the nature of the cause of action and of the relief sought jurisdiction thereof is acquired by the act creating the courts, or its constitution only.—*Ib.* 299.

Same; Jurisdiction of Person.—Jurisdiction of the person is acquired by the court's own action such as its process regularly issued and served, or by the voluntary appearance of the party.—*Ib.* 299.

Same; Local Action; Transitory Action.—Where the cause of action can arise in one place only it is local, but if the cause of action is such a one as might have arisen anywhere, it is transitory.—*Ib.* 299.

Same; Trespass.—Actions for trespass to land are only for damages to be coerced by process against the effects of a defendant to be found within the state, and the title to land cannot be therein

COURTS—Continued.

adjudicated and hence, such action is personal, and its inherent character as such determines the jurisdiction of the court as to the subject matter.—*Ib.* 299.

***Same; Personal Action; Waiver.*—In personal actions, territorial jurisdiction or venue may be waived.—*Ib.* 299.**

***Same; Injuries to Realty.*—The general rule is that actions for injuries to realty must be brought in the forum rei sitae.—*Ib.* 299.**

***Same; Subject Matter; Consent.*—Jurisdiction of the subject matter being derived only from the law, consent cannot confer jurisdiction.—*Ib.* 299.**

***Same; Jurisdiction of Person.*—If the court has jurisdiction of the subject matter, the parties may confer jurisdiction by consent, or by voluntarily appearing and submitting themselves to the judgment.—*Ib.* 299.**

***Same; Determination of Jurisdiction.*—Where it appears that judgment is asked in a cause which the court has no power to decide under any circumstances, the court should repudiate the action ex mero motu, as no plea is necessary to prevent the court proceeding to the rendition of a void judgment.—*Ib.* 299.**

***Same; Statutory Provision; Waiver.*—The statutory provisions fixing the local jurisdiction in both law and equity courts may be waived by a failure to make timely objection.—*Ib.* 299.**

DAMAGES.

See *New Trial, § 1.*

1. Excessive.

***Appeal and Error; Review; Amount of Damages.*—Unless the case presents extraordinary features, where the verdict is greatly above or greatly below the average, it is fair to infer that partiality, prejudice, or other improper motives, influenced the jury, thus justifying the setting aside of the verdict.—*C. of Ga. Ry. Co. v. White,* 60.**

***Same.*—Where there had been two trials on substantially the same evidence, and there is a large discrepancy between the two verdicts, such will authorize the reversal of the judgment on the second trial, but unless the evidence on the two trials is substantially the same, the refusal of the court to set aside the verdict on the second trial, which was largely in excess of the verdict on the first trial, is not of itself erroneous.—*Ib.* 60.**

***Same; Matters Considered.*—In arriving at what is a fair average of damages in similar cases, and determining whether the damages awarded are excessive or inadequate, the court of appeal, must resort to common knowledge, common experience, and general observation, and apply the same to the particular case in hand.—*Ib.* 60.**

***Same; Presumption.*—In determining whether a verdict in a personal injury action is excessive, the court will presume that the jury found that the extent and nature of plaintiff's damages under plaintiff's evidence, was true and correct, although contradicted by defendant's evidence.—*Ib.* 60.**

***Damages; Personal Injury; Excessive.*—The facts of the case stated and other authorities examined and it is held that a verdict for \$16,000 approved by the trial court would not be disturbed on appeal.—*Ib.* 60.**

2. To Goods and Livestock.

***Damages; Evidence; Contract of Carrier.*—Where it appeared that the carrier was not liable for a non-delivery, it was improper**

DAMAGES—Continued.

to permit proof of value of the property at the intended destination.—*So. Ry. Co. v. Wallace*, 72.

Same.—Where the conversion of the stock by a carrier occurred at an intermediate point, if it occurred at all, it was improper to admit evidence of the value of the stock at the point of final intended destination.—*Ib.* 72.

3. Pollution of Stream.

Damages; Pollution; Damages Recoverable.—Damages to a spring caused by the diversion of surface water into a sinkhole are such damages as have accrued prior to the bringing of the action; damages accruing since the commencement of the action are not recoverable.—*Killian v. Killian*, 224.

4. Punitive.

Damages; Punitive; Jury Question.—The amount of damages allowable in an action for malicious prosecution is a question for the jury under proper instruction; punitive damages being recoverable.—*Abingdon Mills v. Grogan*, 247.

DEATH ACTION.

Death; Action For; Right to Recover.—The administrator of the estate of a deceased child may recover damages for its death, although the parents or other persons having control of the child were guilty of contributory negligence.—*City of B'ham v. Crane*, 90.

Same; Action by Administrator; Statute.—Where the right of action for the death of a child arose prior to the adoption of the Code of 1907, action therefor might be brought by the personal representative under section 26, Code 1896, though the infant left parents surviving him, upon whom section 2485, Code 1907, conferred the right to sue, since it is provided in the act adopting the Code of 1907, that its adoption should not affect existing rights.—*Ib.* 90.

DEEDS.**1. Property Conveyed.**

Deeds; Property Conveyed.—Where the deed relied on by plaintiff conveyed to him property described by government subdivision and known as the J. M. place, and recited that it was the grantor's purpose to convey the J. M. place, whether the description by metes and bounds was correct or not, and authorized grantor's executor to ascertain the proper subdivision, should the description be incorrect, the deed was admissible in connection with evidence identifying the lands sued for as being a part of the J. M. place, notwithstanding the incorrectness of the government subdivision.—*Pendrey v. Godicin*, 405.

Deeds; Property Conveyed; Certainty of Description.—Where a deed locates land by monuments, courses and distances with a beginning point that is fixed and certain, and fixes the termini of the several boundaries, which are the corners of the tract, by stakes and intersection with a known section line, though it does not specify the distances, it is *prima facie* certain and admissible as evidence of title.—*Busbee v. Thomas*, 423.

2. Construction.

Same; Construction; Power to Lay Off.—Where the land to be taken was definitely described by monuments, boundaries and corners, it is not invalid as a grant of power to lay off land, which has never been exercised, though the deed states that the grantees are to have ten acres "as they want it."—*Busbee v. Thomas*, 423.

DEEDS—Continued.**3. Delivery.**

Deeds; Delivery; Necessity.—Whether the conveyance be upon a valuable consideration or a voluntary conveyance for love and affection, delivery is indispensable to its validity.—*Culver v. Carroll*, 469.

Same; Life of Grantor.—While the delivery of a deed must be in the lifetime of the grantor to make it valid, an inchoate delivery to a third person as a depositary with instructions to deliver to the grantee upon the grantor's death, and a delivery by him, the depositary being a trustee, to the grantee will relate back to the prior delivery for the purpose of passing title.—*Ib.* 469.

Same.—A delivery of a deed subject to recall by the grantor before delivery to the grantee is not effective to pass title.—*Ib.* 469.

Same; Question to Jury.—The question whether a grantor in a deed executed his intention to pass title by a sufficient delivery is one of fact and generally for the jury.—*Ib.* 469.

Same; Right to Revoke.—A right to revoke a delivery of a deed by a grantor to a person other than the grantee or his agent, which will render the delivery ineffectual to pass title need not be expressly reserved; it being sufficient that the grantor's act did not as a matter of law place the deed beyond his control.—*Ib.* 469.

Same.—There is no presumption that a handing of a deed to a person other than the grantee or his agent was with the intention to pass title to the grantee, and, to make such act a delivery, the intention of the grantor must have been expressed in unmistakable manner at the time of execution or subsequently while the deed was in his possession.—*Ib.* 469.

Same.—Merely leaving a deed with the agent or attorney of the grantor is wholly insufficient to show an intention to divest the title and will not constitute a delivery.—*Ib.* 469.

Same; Delivery; Establishment.—The fact that a deed named the wife of the grantor as grantee and embraced all the property of the grantor, was in the handwriting of a resident lawyer and notary public, recited a consideration of love and affection, and directed that the wife pay the grantor's just debts, and that upon the same day, the grantor committed suicide, are not circumstances showing acts or declarations of the grantor at the making of the deed, of its delivery, and are not sufficient to show that the grantor delivered a deed to a third person for his wife.—*Ib.* 469.

Same.—The mere handing of a deed to a stranger with a request to keep it, without mentioning what the paper was, or the grantee's name, is not sufficient as a delivery to a grantee therein, although the grantor's wife.—*Ib.* 469.

Deeds; Delivery; What Constitutes.—Although physical custody of the instrument is retained by the grantor a complete delivery of a deed is made by a grantor who parts with the control of the deed, or who does any act or says anything whereby he evinces an intent to part with control over it and pass it to his grantee.—*Farr v. Chambliss*, 659.

Same; Evidence.—The evidence in this case examined and held to support a finding of a delivery of a deed.—*Ib.* 659.

4. Validity.

Same; Incompetency of Grantor; Evidence.—An heir suing to set aside a deed of his ancestor on the grounds of insanity has the burden to show incompetency at the time of the execution of the deed, and where the evidence is about equally balanced the court will not set aside such a deed, especially where the justness of the transaction indicates a sound mind.—*Farr v. Chambliss*, 659.

DISCOVERY.

1. Answering Interrogatories.

Discovery; Interrogatories; Answers.—Where an answer to an interrogatory is not shown not to be pertinent, it should not be stricken out merely because it is irresponsible.—*Rice v. So. Ry. Co.*, 69.

DIVORCE AND ALIMONY.

Divorce; Appeal; Decisions Reviewable.—An order made in an action for divorce denying a motion to require the complainant to pay the costs of the previous suits as a condition precedent to the prosecution of the suit, and granting complainant's petition for alimony pendente lite, and ordering a reference to ascertain the amount thereof will not support an appeal.—*Jordan v. Jordan*, 640.

Same; Alimony; Discretion of Court.—The allowance to complainant of alimony pendente lite in a second suit without first requiring complainant to pay the costs of the former suit, was within the discretion of the court, especially where the plaintiff alleged that the former suit for divorce and alimony was dismissed on respondent's solicitation to effect a reconciliation, defendant agreeing to provide for her and that they should live together, and that after the dismissal of the suit defendant failed and refused to carry out his agreement.—*Ib.* 640.

Same; Appeal; Review.—Where counsel for defendant had notice of the time and place for the execution of the reference as to alimony and failed to appear, defendant could not except to the confirmation of the report.—*Ib.* 640.

EJECTMENT.

See Adverse Possession.

1. Evidence.

Ejectment; Evidence; Identification.—In an action of ejectment it is competent to introduce parol evidence of the identity of land as being part of a place described in a deed, as the place known as the J. M. place.—*Pendrury v. Godirin*, 405.

Ejectment; Evidence; Statements of Persons Claiming Land.—While statements which are explanatory of a proven possession are admissible, in ejectment, the fact of possession itself cannot be proven by a statement of a person claiming the land, hence, a question to a witness in ejectment as to whether defendant showed him a deed and stated that he was in possession of the land embraced, was properly excluded.—*McBride v. Loice*, 408.

Ejectment; Evidence; Identification.—In ejectment a plaintiff must identify the tract sued for with that described in a deed introduced as evidence of title; and where the description in the deed was by monuments and boundaries, it was necessary to locate such monuments and boundaries by competent evidence.—*Busbee v. Thomas*, 423.

Same.—Possession under an ancient deed for more than fifty years is strong evidence that original boundaries mentioned in the deed are those of the land possessed.—*Ib.* 423.

Same.—The evidence examined and held sufficient to support a finding that the boundaries and monuments mentioned in an ancient deed introduced as evidence of title were the same as those of the tracts sued for.—*Ib.* 423.

Same.—A question put to a witness in ejectment as to whether plaintiffs had exercised any acts of ownership over any of the land in suit, or anything else, in the last twenty-five years was objectionable as calling for matters outside the issue.—*Ib.* 423.

EJECTMENT—Continued.**2. Notice to Landlord.**

Ejectment; Process; Notice to Landlord.—Under section 3840, and section 3844, Code 1907, the landlord simply becomes a party, but not the sole party to the suit, hence, though a tenant suggested his landlord as a party, the tenant remained a party, and where during the pendency of the suit the landlord conveys the premises to the tenant, the tenant could still defend under the title granted.—*Leath v. Cobia*, 435.

3. Pleas in.

Appeal and Error; Review.—A plea of not guilty or a plea since the last continuance being the only proper pleas in ejectment, the action of the court on motion to strike and demurrer to special pleas will not be considered on appeal where a case was tried and a verdict rendered for defendant on the plea of not guilty.—*Leath v. Cobia*, 435.

4. Instructions.

Ejectment; Notice; Instruction.—An instruction on the issue of constructive notice must qualify the word notice by referring to it as constructive notice.—*Christopher v. C. A. I. Co.*, 484.

ELECTION.

Election; Contest; Bond; Amendment.—Although the bond was insufficient under section 470, Code 1907, and the petition was properly dismissed therefor, it was error to refuse to set aside such order where the petitioner immediately offered to perfect the security.—*Lowery v. Petree*, 559.

EMINENT DOMAIN.

Eminent Domain; Proceedings; Collateral Attack.—That a petition for the condemnation of land was addressed to the probate judge instead of to the probate court (section 3889, Code 1907,) cannot be asserted in ejectment to affect the validity of the title of one who claims thereunder.—*Leath v. Cobia*, 435.

Same.—While the petition and condemnation proceedings must state the jurisdictional facts, defects which would be fatal on demurrer or other direct attack upon the petition are not fatal when collaterally attacked where the rule of presumption of regularity obtains: hence, though such petition does not mention the age and residence of the party owning land sought to be condemned, the final decree showing that the amount of condemnation money was paid, the petition was sufficient against attack in ejectment, against one claiming under condemnation, especially where it appears that summons was served on such party, and his own testimony showed that he was over twenty-one years of age.—*Ib.* 435.

Same; Proceedings; Petition.—The petition held to sufficiently show that the condemnation proceedings was in the probate court and were sufficient under the requirement that the proceeding be addressed to the probate court. (Section 3889, Code 1907.)—*Ib.* 435.

Same; Raising a Dam; Petition.—Under section 3904, Code 1907, one who had commenced the erection of a dam without authority of law could only proceed to raise a dam as though he had no dam, and the fact that his petition was to establish a dam would not render the condemnation proceedings void.—*Ib.* 435.

EQUITY.

Equity; Jurisdiction; Grounds.—Equity jurisdiction is extraordinary, and matters cognizable at law are not the subject of equity jurisdiction except when such tribunals are inadequate to grant full and complete relief.—*Ashurst v. Ashurst*, 667.

ESTATES.

Estates; Removal; Bill.—Where a bill is filed to remove the settlement and administration of an estate from the probate to the chancery court for the purpose of construing a will and administering a trust, the mere filing of the bill did not remove the proceeding from one court to the other, but only authorized the chancery court, if the bill was sufficient, to order the removal of such proceeding, and hence, the court was not entitled to construe the will on demurrer to the bill.—*Ashurst v. Ashurst*, 667.

Same; Grounds.—Where the assistance of the chancery court is necessary to construe a will and administer the trust therein provided for, this is sufficient grounds to authorize the removal of the administration of the estate from the probate to the chancery court.—*Ib.* 667.

EVIDENCE.

For evidence in particular actions or crimes, see that title, subtitle "Evidence."

See also Appeal and Error; Trial.

1. Character.

Witnesses; Opinion; Character of Decedent.—A witness is entitled to give his opinion of the character of a decedent in his own language, especially where it appeared to be based in part upon the estimate of such character in decedent's neighborhood; and hence, was entitled to state that decedent was of a violent character, although he had never heard anyone else expressly state that such was his character.—*Roberson v. The State*, 15.

2. Opinion or Conclusion.

Evidence; Opinion Evidence.—In an action against a municipality for the death of an infant drowned in an alleged defective sewer, expert testimony that the sewer system as provided was reasonably safe, was inadmissible as usurping the functions of the jury.—*City of B'ham v. Crane*, 90.

Evidence; Opinion; Conclusion.—Where a witness was asked whether a mule with which he was acquainted was ordinarily gentle, his answer that from what he had seen he would say it was a gentle mule, was not objectionable as a conclusion.—*Ala. C. C. & I. Co. v. Cowden*, 108.

Evidence; Opinion.—Possession being a fact to which a witness may testify it is proper to ask a witness as to who was in actual possession of certain lands.—*Cooper v. Slaughter*, 211.

Evidence; Conclusions.—Acts of ownership are statements of collective fact, and a witness with a personal knowledge of the subject matter may testify whether a party has exercised acts of ownership over the land in suit in the last twenty-five years, without his testimony being objectionable as an opinion or conclusion.—*Busbee v. Thomas*, 423.

Evidence; Conclusion of Witness.—Where the land was in the possession of the vendor, a statement by a witness that he as agent of the purchaser of standing timber was in possession of the timber, though not in possession of the land, was a mere conclusion.—*Christopher v. C. A. L. Co.*, 484.

EVIDENCE—Continued.**3. Judicial Notice.**

Evidence; Judicial Notice; Public Acts.—The court takes judicial notice of the public acts of the Legislature, although local in their application.—*Dug v. Ala. Western Ry. Co.*, 162.

Same; Judicial Notice.—The court will take judicial notice that there are two tracts of land in Mobile county which answer to the description "N. E. $\frac{1}{4}$ of section 36, township 2, range 4."—*Brannan v. Henry*, 454.

Evidence; Judicial Notice.—The courts take judicial notice of the journal of each legislative house.—*State ex rel. Crenshaw v. Joseph*, 579.

Same; Population of Cities.—The court will take judicial notice that the city of Birmingham was the only city to which General Acts 1911, p. 204, was applicable when the act was passed, it being the only city having a population of 100,000.—*Ib.* 579.

4. Expert.

Evidence; Expert; Weight.—The jury is not, as a matter of law, required to accept the conclusion of an expert witness, but must determine for themselves the weight to be accorded to such money and base their verdict on their own judgment of the facts.—*Robinson v. Crotwell*, 194.

5. Boundaries and Possession.

Same; Declaration as to Boundary.—In an action of trespass involving the location of a boundary line, cross examination of a defendant as to acts and declarations of a co-defendant concerning the location of the boundary, and cross examination of defendant's witnesses relative to the same matter, was proper as bearing on the character of the co-defendant's possession.—*Cooper v. Slaughter*, 211.

6. Documentary.

Evidence; Documentary; Deeds.—Under section 3374, Code 1907, the original record is admissible though the statute mentions only the transcript of the record, and upon the showing by one of the plaintiffs in ejectment that he did not have possession or custody of the deed in question, the record was properly admitted.—*McBride v. Louce*, 408.

Evidence; Documentary Evidence; Retroactive Statutes; Curative Acts.—The plaintiff objected to defendant's offer as evidence of title of a patent dated February 20, 1872, purporting to have been executed by the Governor by his secretary, on the ground that the patent had not been executed by the Governor, and was not sealed with the great seal of the state, which objection was good at the time it was made. The court took the objections under advisement, and continued the hearing, and before ruling on the objection, Acts 1911, p. 192, was passed and approved. Held, that although the objection was well founded when taken, courts are bound to apply the law as it exists at the time the ruling was made, and that as the statute curing the defects went into effect from the moment of its approval, and before the ruling on the objection, the objection was properly overruled.—*Brue v. McMillan*, 416.

Same; Recital in Patent; Effect.—Recitals in a state patent to swamp lands that a certificate of the receiver of the swamp and overflow lands of the state of Alabama, in and for the district of Mobile, had been deposited in the office of the Secretary of State, whereby it appeared that full payment for the lands had been made

EVIDENCE—Continued.

by the patentee according to the Acts of February 8, 1861, were of no consequence in this case, as evidence of the fact of payment, as plaintiff was not affected by them, but by the state's conveyance of title which it had power to make on any consideration deemed proper.—*Ib.* 416.

7. Maps Locating Land.

Evidence; Location of Land; Map.—A certified copy of a map on file in the office of the State Land Office, the original bearing date of 1871, was admissible for the purpose of locating the land in controversy.—*Bruce v. McMillan.* 416.

8. Hearsay.

Same; Hearsay; Common Reputation.—Because of its hearsay character, common reputation is not admissible in ejectment to prove the number of acres in the tract in suit.—*Busbee v. Thomas.* 423.

9. Ancient Documents.

Evidence; Ancient Documents.—When coming from the proper custody, an ancient document is self-proving and admissible without evidence of its authenticity.—*Brannan v. Henry.* 454.

10. Weight.

Evidence; Weight.—The weight to be given to the evidence of a witness is for the jury, and the court may not reject the testimony of a witness who testifies to the due execution of a will and who states that he gives his best recollection.—*Bruce v. Sierra.* 517.

EXECUTORS AND ADMINISTRATORS.

See Death Action.

FALSE IMPRISONMENT.

See Malicious Prosecution.

False Imprisonment; Civil Liability; Justice of the Peace.—A justice of the peace acts judicially and is not civilly liable, who in good faith issues a warrant for an arrest on an affidavit of a third person, averring that accused threatened to trespass on and occupy land of which affiant has been in possession under claim of ownership, and who in good faith, after a hearing commits accused to jail unless he gives bond to keep the peace, although the affidavit was wholly insufficient to charge any criminal offense.—*Broom v. Douglass.* 208.

Same; Burden of Proof.—One who sues a justice of the peace for damages for issuing a warrant on an affidavit not charging any criminal offense has the burden of proving want of good faith.—*Ib.* 268.

FRAUD.

See Fraudulent Conveyance.

Fraud; Pleading; Necessity.—The rule is that facts constituting the fraud must be alleged with particularity, and where the pleader undertakes to state the facts, they must show fraud; but where the issue at law is as to the title to real or personal property under a claim that the title of one of the parties was obtained by fraud, the facts constituting the fraud need not be alleged with the same particularity required by a bill in chancery to cancel such a conveyance.—*South. C. O. Co. v. Harris.* 323.

FRAUDULENT CONVEYANCES.

See Fraud.

Fraudulent Conveyance; Defenses; Pleas.—Under the provisions of section 4293, Code 1907, a mere attempt to sell and convey a stock of goods, and their consequent removal to the storehouse of the purchaser, and intermingling with other goods, is not fraudulent and will not avoid the sale.—*South. C. O. Co. v. Harris*, 323.

Same; Insolvency of Transferrer.—A debtor may prefer a creditor and sell his property to him for a fair consideration in payment of an existing debt, though he is insolvent, and that fact be known to the purchaser; hence, in trespass for the taking of a stock of goods, justified upon the ground of a fraudulent sale, and an attachment, questions as to the insolvency of the seller and as to his informing the purchaser thereof, are immaterial, and properly excluded.—*Ib.* 323.

FRAUD, STATUTE OF.

Frauds; Statute of; Written Authority.—Even though the principal be a corporation written authority is not necessary to enable an agent to bid in land for the principal at a mortgage foreclosure sale.—*Mills v. Hudmon & Co.*, 448.

GAMING.

Gaming; Action; Plea; Illegality.—Where the action was on a promissory note alleged to have been executed by the defendant to the assignor of plaintiff, a plea alleging that it was not intended or contemplated by either of the parties to the transaction that the actual cotton would be delivered, but that it was contemplated and intended by all such parties that at the time of delivery differences would be settled by paying or receiving the difference between the price when sold and the price at the time of delivery, and the note having been given for margins advanced and commissions for purchasing cotton on margins without actual delivery, was sufficient as alleging that the parties mutually intended that the transaction should be adjusted by the payment of the differences only, so as to render the contract unlawful, the word "contemplated" as used in the plea signifying purpose or intention.—*B'ham T. & S. Co. v. Curry*, 373.

Same; Validity; Purchasing on Margin.—An agreement by plaintiff's assignor with defendant to procure contracts for the purchase and sale of cotton on margins only, and without actual delivery, was void as between the parties, preventing recovery of commissions, or of margins advanced by the assignor in furtherance of the agreement, whether the contracts actually made with others by the assignor of plaintiff were for the actual purchase of cotton, or not, as that was a mere evidential fact, bearing on whether the contract between such assignor and such defendant, was a wagering contract.—*Ib.* 373.

Same; Evidence.—Where the action was on a promissory note alleged to have been executed by defendant to plaintiff's assignor for margins advanced and for commissions for purchasing cotton, it was competent, on the question of whether such purchases were intended as wagering contracts, to show that there had never been any actual delivery in other transactions between the parties involving the purchase of cotton for future delivery, although evidence as to gambling transactions between plaintiff's assignor and third persons were not admissible.—*Ib.* 373.

GUARANTY.

Guaranty; Validity; Acceptance.—Although notice of the acceptance of a mere proposed guaranty is necessary, no further acceptance was required where a guaranty contract, completely executed by the parties, recited that the sellers agreed to extend certain credit to the buyers, and that the guarantor, in consideration of a named sum in hand paid, guaranteed the payment of a certain part of the proposed indebtedness.—*Shours v. Steiner, et al.*, 363.

Same; Order of Signing.—Where the guaranty stated on its face that it was a continuing guaranty for twelve months and showed that the proposal proceeded from the creditors to the guarantor, the order in which the parties signed it was not material to its validity.—*Ib.* 363.

Same; Consideration.—Where a guaranty contract for the payment of a proposed indebtedness of \$1,000 recited on its face that it was made in consideration of the sum of \$5 in hand paid, the receipt of which was acknowledged, it was immaterial that the consideration was not actually paid.—*Ib.* 363.

Same; Remedy of Creditor; Compromise of Indebtedness.—Where the contract sued on provided that the creditor could compound the indebtedness with the principal debtor without in any way affecting the guaranty, a plea by the guarantor setting up a compromise whereby the principal debtor was released, but not alleging specifically that the guarantor was thereby released, was insufficient.—*Ib.* 363.

Same; Instructions.—A compromise between the creditor and the principal debtor without any agreement that it affect the guaranty would not extinguish the guarantor's liability, where the contract provided that the creditor and debtor could compound the indebtedness without in any way affecting the guaranty.—*Ib.* 363.

Same; Issue for Jury.—Where the complaint, in an action on a guaranty, averred that the creditor extended credit to the accommodated parties as stipulated in the guaranty, and the evidence for the defendant was that the creditor failed and refused to extend the credit for the full amount named, the issue thus raised was one for the jury.—*Ib.* 363.

HOMICIDE.

1. Evidence.

Homicide; Evidence; Res Gestae.—The fact that deceased was shooting craps at the house of a witness thirty minutes before the shooting in which he was killed was neither relevant nor of the res gestae.—*Parris v. The State*, 1.

2. Instructions.

(a) Self-Defense.

Same; Instructions; Self-Defense.—A charge on self-defense which fails to include the fact that defendant was without fault in bringing on the difficulty, and also whether defendant's mind was impressed that he was in imminent danger, and whether he could retreat without increasing his danger, is properly refused.—*Parris v. The State*, 1.

Homicide; Self-Defense.—Charges on self-defense which ignore the duty to retreat and the imminence of danger, either real or apparent, are properly refused.—*Ib.* 1.

Same; Instructions; Self-Defense.—Instructions on self-defense not hypothesized on an honest and reasonable belief of imminent danger and the necessity to kill, held by accused, are properly refused.—*Roberson v. The State*, 15.

HOMICIDE—Continued.**3. Resisting Arrest.**

Homicide; Self-Defense; Resisting Arrest.—A citizen may resist an unlawful arrest but may not use such force as will endanger the life of the officer.—*Adams v. The State*, 8.

4. Verdict.

Homicide; Verdict; Finding Degree.—A conviction for murder cannot stand unless the verdict expressly finds the degree of the crime of murder. (Sec. 7087, Code 1907.) This is not necessary where the conviction is of manslaughter.—*Roberson v. The State*, 15.

HOSPITALS.**See Physicians and Surgeons.**

Hospitals; Malpractice; Liability.—A physician owning a hospital is not liable for failure to furnish an adequately equipped place in which a surgeon may operate on a patient with safety: the responsibility for the sufficiency of the equipment resting on the surgeon performing the operation.—*Robinson v. Crotwell*, 194.

Same.—Where a physician kept a hospital and treated a patient for several years, advising an operation and procuring a skilled surgeon to perform the operation for compensation agreed on to be paid by the patient, and such physician took part in the operation to the extent only of administering the anaesthetic, and advising that the effort to complete the operation be abandoned on account of the patient's ebbing vitality, and there was no suggestion that the physician showed any lack of skill, or committed any error, or that he negligently advised the employment of an incompetent surgeon, such physician was not liable for any default on the part of the surgeon who practiced his profession as an independent agent.—*Ib.* 194.

HUSBAND AND WIFE.

Husband and Wife; Suretyship; Mortgage on Wife's Property.—Where the note was signed by both the husband and the wife, and the wife seeks to defeat the note and mortgage on her land on the ground that the debt was that of the husband alone, and that she executed the same as his surety, she has the burden of proof.—*Mills v. Hudmon & Co.*, 448.

Same.—When part of the debt secured by the mortgage on the wife's property, was her personal debt or the joint debt of her and her husband, the mortgage would be valid to that extent, though void to the extent that the debt was exclusively that of the husband and the wife was only a surety.—*Ib.* 448.

INDICTMENT AND INFORMATION.**See particular crimes for indictment in.****1. Endorsements on.**

Indictment and Information; Endorsement; Form.—Where the record showed that one R. had been appointed foreman of the grand jury, the mere fact that his name was written under instead of above the words, "Foreman of the grand jury" in the endorsement of an indictment afforded no grounds for quashing the same.—*Parris v. The State*, 1.

INJUNCTION.

Injunction; Subjects; Trespass Upon Land.—While a bill to enjoin trespass cannot be substituted for ejectment, yet injunction will lie for a reasonable time to enable the parties to bring a suit at law to establish the legal title.—*Driver v. New*, 655.

INKEEPERS.

Inkeepers; Boarding House.—An inn when unlicensed is distinguished from a boarding house in that the guests of a boarding house are under an express contract at a certain rate and for a specified time, and the keeper may select the guest and fix full term, while an inn is for the entertainment of all who come lawfully and pay regularly.—*B'ham Ry., L. & P. Co. v. Drennen*, 338.

INSURANCE.

Insurance; Policy; Forfeiture Clause.—The rule that insurance contracts will be strictly construed against the insurer should be especially followed as to clauses working a forfeiture.—*Continental C. Co. v. Ogburn*, 357.

Same; Accident Insurance; Construction.—Parts one and two of the policy stated and it is held that a death loss under such policy was expressly limited to an injury described in part one, which must have resulted necessarily and solely therefrom within 90 days after its infliction, and hence, an objection that the provisions of part one were inapplicable in case of loss by death, cannot be sustained.—*Ib.* 357.

Same; At Once; Immediately.—Where the policy owner is insured against bodily injuries caused through external, violent and purely accidental means, causing at once and continuously after the accident total inability to engage in any and every labor or occupation, etc., the term, "at once" or "immediately" must be construed as adverbs of time and not causation, and are not intended to mean reasonable time, but rather presently or without any substantial interval between the accident and the disability.—*Ib.* 357.

Same; Proof of Loss; Waiver.—Where preliminary proofs of loss are presented in due time to the insurer, defects therein may be waived by failure to object to them on that ground, or by refusing to pay for any reasons other than defects in the proof.—*Ib.* 357.

JEOPARDY.

See Criminal Law, § 2.

JUDGES.

1. Liability for Official Acts.

Judges; Official Acts; Liability.—The judge of a court of general jurisdiction is not liable for any judicial act in excess of his jurisdiction, which involves an affirmative decision of the fact of jurisdiction, though the decision is erroneous, and though he acts maliciously; the rule is different where there is a clear absence of all jurisdiction.—*Broom v. Douglass*, 268.

Same; Civil Liability.—The judge of a court of limited jurisdiction is liable civilly when he acts without a general jurisdiction of the subject matter, although his act involves a decision that he has such jurisdiction, made in good faith.—*Ib.* 268.

Same.—A judge of an inferior court who acts fully within his jurisdiction of the subject matter, and who has acquired jurisdiction of the person in a particular case, is not liable civilly, notwithstanding he acts maliciously and corruptly.—*Ib.* 268.

Same.—Where a judge of an inferior court acts judicially as to a subject matter of which he has general jurisdiction, but in the particular case, has not acquired jurisdiction of the person affected, he is not liable civilly where the act involves an affirmative decision that he has jurisdiction of the person and authority to proceed, provided a colorable case has been presented to him, calling for the

JUDGES.—Continued.

exercise of judgment and he had determined in good faith that the case called for the exercise of general jurisdiction.—*Ib.* 268.

Same; Question for Court.—Whether a judge of an inferior court had colorable cause for action so as to be relieved of civil liability, as a question of law.—*Ib.* 268.

Same; Question for Jury.—The question of good faith, malice or corruption on the part of a judge of an inferior court having only colorable cause for acting, is one ordinarily for the decision of the jury in determining the question of his civil liability.—*Ib.* 268.

2. Qualification.

Judges; Qualifications.—Construing section 154, Constitution 1901, in the light of conditions existing at the time of its adoption, and the judicial history of the state as evidenced by prior Constitutions and the Acts of the Legislature, it is held that said section 154 did not inhibit the legislature from requiring judges of probate courts to act as judges of the county court, even though such court was a court of record and such judges were not learned in the law, since section 139, Constitution 1901, impliedly authorizes the legislature to impose on probate judges and other persons the duties and functions of inferior courts.—*State ex rel. Vandiver v. Burke*, 561.

Same; State Court; Probate Court.—Section 280, Constitution 1901, does not prohibit the legislature from investing probate judges with the powers and duties of judges of the county court, for section 139 of such Constitution mentions such persons as may be, by law, invested with the powers of a judicial nature, including judges of probate.—*Ib.* 561.

JUDGMENT.

See Criminal Law, § 1.

1. Entry and Amendment.

Judgment; Entry on Docket; Alteration.—After adjournment of the term a judgment entered upon the minutes, the minutes having been signed by the judge, cannot be altered or amended except for clerical error or omission on evidence shown by the record; parol evidence being insufficient to warrant amendment nunc pro tunc.—*Briggs v. T. C., I. & R. R. Co.*, 130.

Same; Record; Evidence.—The mere omission of the bench notes of the trial judge to mention pleadings is not such record evidence as warrants alteration after the expiration of the term of a duly entered judgment, which recited the existence of such pleadings, as there is no law requiring the judge to make bench notes.—*Ib.* 130.

Same.—Where the original judgment entered by the clerk was stricken out and another substituted, the fact that the original judgment still appeared in the minutes of the court was not such record evidence as would warrant the court in amending the second judgment nunc pro tunc after the expiration of the term, for without the aid of parol evidence, it will be presumed that the first was erased by order of the court.—*Ib.* 130.

Judgment; Entry.—The records of courts import absolute verity and cannot be contradicted by parol; hence, in ejectment parol testimony was not admissible to show that a decree of condemnation, under which the defendant claimed, was written on the record by the judge before whom the proceedings were had after the expiration of his term of office upon the misplacement of the final decree, espe-

JUDGMENT—Continued

cially where the record on its face showed that the decree was rendered and entered within the time prescribed, and on a date during the term of the judge.—*Leath v. Cobia*, 435.

2. In bar.

Judgment; Pleading in Bar.—In an action for divorce the defense of a bar by a former action should be invoked by proper plea and not by motion.—*Jordan v. Jordan*, 640.

JURORS AND JURIES.

See *Criminal Law*, § 1.

1. Petit Jury.**(a) Venire.**

Jury; Special Venire; Persons Excused from Regular Panel.—Although two persons summoned as regular jurors were excused from serving on the regular panel, they were properly placed on the special venire served on the defendant.—*Parris v. The State*, 1.

(b) Disqualification.

Jury; Disqualification; Boarders.—Where the action was by the wife for the death of the husband, and one of the jurors was a boarder at her house, which fact was unknown to defendant at the time of or before the trial, such juror was disqualified, and the fact that he sat in the case was sufficient to vitiate the verdict.—*B'ham Ry., L. & P. Co. v. Drennen*, 338.

JUSTICES OF THE PEACE.

See *Courts; Judges; Venue*.

Justice of Peace; Trespass; Waiver of Jurisdiction.—Where the action was brought in M. county for trespass to lands situated in L. county and no plea to the jurisdiction was interposed until after the cause had been twice continued, once at the plaintiff's instance and once by agreement of parties, and until after plaintiff had announced ready on the merits, the defendant waived his right to plead in abatement by his delay, notwithstanding the provisions of section 6110, Code 1907.—*Woolf v. McGaugh*, 299.

LIMITATION OF ACTIONS.

Limitation of Actions; Computation of Period; Personal Disability; Infancy.—Sections 4846 and 4860, are in pari materia and the saving statute operates in favor only of the person to whom the cause of action first accrued, and not to those who succeeded to his rights, unless at the time of their succession the statute had not begun to run against their predecessor in right; hence, a plaintiff claiming the benefit of the exception in favor of infants must show either that the cause of action accrued to him originally or that he had succeeded to the rights of one against whom limitations had never begun to run.—*Richardson v. Mertins*, 309.

LOGS AND LOGGING.**1. Sale Standing Timber.**

Logs and Logging; Sale of Timber.—Without more a sale of standing timber passes no interest in the soil generally, and confers no right of possession exclusive of the general owner's possession, and until such purchaser entered on the land and severs the timber, the actual possession of the timber remains in the general owner.—*Christopher v. C.-A. L. Co.*, 484.

MALICIOUS PROSECUTION.

See False Imprisonment.

Malicious Prosecution; Burden of Proof.—Where the action is for malicious prosecution, the burden is upon plaintiff to establish that the defendant maliciously prosecuted him, or caused him to be prosecuted, without probable cause, that the prosecution was ended and that plaintiff was damaged in consequence of the prosecution.—*Hanchey v. Brunson*, 236.

Same; Malice; Want of Probable Cause.—If there are no circumstances to rebut the inference, malice may be inferred from want of probable cause for instituting the prosecution.—*Ib.* 236.

Same; Acts and Conduct.—Where such conduct will admit of no other reasonable construction, malice in instituting the prosecution may be inferred from defendant's acts and conduct.—*Ib.* 236.

Same; Acts of Plaintiff.—Acts of plaintiff occurring after the commencement of a malicious prosecution are not admissible for the purpose of rebutting malice or showing probable cause, since defendant could have had no knowledge or notice of them when the prosecution was begun; hence, evidence that plaintiff broke jail and escaped after his arrest, and was thereafter re-arrested was not admissible.—*Ib.* 236.

Same; Probable Cause.—As employed in actions for malicious prosecution, the term probable cause means such a state of facts in the mind of the prosecutor as would lead a man of ordinary caution or prudence to believe or entertain an honest and strong suspicion that the person is guilty of the crime alleged.—*Ib.* 236.

Same; Want of Probable Cause; Innocence of Accused.—As a prosecution will not become malicious by reason of the innocence of the plaintiff, unless the prosecutor had knowledge thereof, evidence of innocence does not become admissible where the prosecutor is not chargeable with notice of the facts sought to be introduced; hence, evidence of the facts occurring after the commencement of the prosecution was not admissible to show malice or want of probable cause, though possibly admissible to show the termination of the prosecution.—*Ib.* 236.

Same; Burden of Proof.—A showing of the acquittal of the plaintiff of the charge alleged to have been maliciously instituted lifts from plaintiff the burden of showing want of probable cause.—*Ib.* 236.

Same; Damages; Necessity to Allege.—Where no specific claim was made therefor in the complaint in an action for malicious prosecution, evidence as to the condition of the plaintiff's wife while he was in prison being a matter of special damages, was properly refused.—*Ib.* 236.

Same; Instructions.—Where charges embrace items of special damages not claimed in the complaint, they are properly refused.—*Ib.* 236.

Malicious Prosecution; Defense; Consulting Attorney.—The fact that defendant consulted a reputable attorney before instituting the alleged prosecution and that the attorney advised the prosecution is not of itself a complete defense to an action for malicious prosecution.—*Abingdon Mills v. Grogan*, 247.

Same; Evidence.—Where the action was against a corporation for malicious prosecution on a charge of enticing defendant's employees away, it was competent for plaintiff to show that the deputy sheriff who arrested him was appointed at defendant's request as shedding light on whether he was acting as defendant's agent in arresting plaintiff, and not in his official capacity.—*Ib.* 247.

MALICIOUS PROSECUTION—Continued.

Same; Jury Question.—Under the evidence in this case it was a question to be determined by the jury whether the prosecution was instituted in good faith on advice of counsel.—*Ib.* 247.

Same; Probable Cause.—The evidence examined and held not to show that there was probable cause for belief on defendant's part that plaintiff was guilty of the offense for which he was prosecuted.—*Ib.* 247.

Same; Punitive Damages.—Punitive damages may be recovered for a malicious prosecution.—*Ib.* 247.

MANDAMUS.

Mandamus; Alimony; Vacation of Decree.—Mandamus is the proper remedy to require the lower court to stay proceedings in a divorce action until complainant pays the costs of previous suit, and also to show cause why the order denying the alimony should not be vacated.—*Jordan v. Jordan*, 640.

MARRIAGE.

Evidence; Marriage; Presumption.—While all reasonable presumptions are indulged in favor of marriage, such presumptions are overcome by proof that the relations were in their origin meretricious and unlawful, and such meretricious relation is presumed to continue until there is proof that the parties were married, but this presumption also whether of law or fact may be overcome by satisfactory proof of cohabitation, acknowledgment and reputation.—*Prince v. Edwards*, 532.

Marriage; Common Law Marriage.—The evidence examined and held to warrant a finding of cohabitation with matrimonial intent, although unlawful in its inception, and that after the death of the first husband, the parties renewed their matrimonial pledges, and entered into a common law marriage, as affecting the woman's right to letters of administration as a widow.—*Ib.* 532.

MASTER AND SERVANT.1. *Injury to Servant.*(a) *Warning.*

Master and Servant; Injury to Servant; Warning.—Where a foreman directed an employee to work at a point upon the ground 40 or 50 feet below an overflow pipe from which he knew sulphuric acid occasionally dripped, and the employee was ignorant of this fact, the failure of the foreman to warn the employee constituted negligence.—*Ala. Chem. Co. v. Phelps*, 121.

(b) *Assumption of Risk.*

Same; Assumption of Risk.—An employee in charge of men engaged in taking down an overhead bin 15 or 20 feet above ground, but who had nothing to do with an overflow pipe still farther above ground, from which sulphuric acid occasionally dripped did not assume the risk of injury from the dripping of the acid in his eyes.—*Ala. Chem. Co. v. Phelps*, 121.

(c) *Contributory Negligence.*

Master and Servant; Injury to Servant; Contributory Negligence.—Under the facts in this case it is held that plaintiff's failure to avoid the danger arising from defects in the machinery was at least due to inattention, absent-mindedness or thoughtlessness and hence, plaintiff was guilty of contributory negligence proximately contributing to his injury.—*K&Kby F. & S. Co. v. Jackson*, 125.

MASTER AND SERVANT—Continued.**2. Assault by Servant.**

Master and Servant; Assault by Servant; Liability of Master.—The facts in this case examined and held to hold the master for liability for an assault by a servant, or at least that the master could not avoid liability on the ground that it was not within the scope of the servant's authority, since it was committed as a result of plaintiff's complaint about such servant's delay.—*Gessnerheimer v. W. Ry. of Ala.*, 819.

MECHANICS' LIEN.

Mechanics' Lien; Sale of Building; Entry to Remove; Expiration of Lease.—No exception is made by section 4756, Code 1907, where the entry and removal were after the lease had expired, and the premises had passed into the possession of the owner or another lessee, and the happening of such an event would not render the purchaser a trespasser.—*Wildman v. Evans Bros. Const. Co.*, 333.

Same; Enforcement; Redemption; Who May Redeem.—Under sections 4756 and 4757, Code 1907, the lessor may, by payment of the amount secured, retain the building before sale to enforce the lien, or after sale by paying the value of the building, but this gives the right only to the lessor that he may preserve the premises in their improved condition, and a lessee with no showing of special authority is without right to redeem.—*Ib.* 333.

MORTGAGES.**1. Description and Validity.**

Mortgages; Validity; Description.—Though the first call of the description of land mortgaged be uncertain and ambiguous, yet where the other calls are definite under which the land can be located, the latter will govern, and the mortgage will not be invalid for ambiguity.—*Bell, et al. v. Leggett, et al.*, 443.

2. Foreclosure.

Mortgage; Validity of Foreclosure; Materiality; Ejectment.—A defendant in ejectment having failed to plead payment on the mortgage debt under section 3851, Code 1907, cannot set up the invalidity of the foreclosure sale as an answer to an action of ejectment by the mortgagee who had purchased the land at the foreclosure sale, the validity vel non of the foreclosure sale being immaterial.—*Mills v. Hudmon & Co.*, 448.

Mortgages; Redemption From Foreclosure Sale; Service of Demand.—The written demand required by section 5747, Code 1907, to be served on the debtor or one holding by privity must be served on the debtor or his holder to bar the right to redeem; the mere reading to him of an alleged written demand not being sufficient.—*Hutchison v. Flowers*, 651.

Same; Waiver.—The refusal of a debtor to deliver possession of land to the purchaser at mortgage foreclosure sale on the purchaser's oral demand will not constitute a waiver of a demand in writing.—*Ib.* 651.

3. Payment.

Same; Payment as Defense.—Where a defendant in ejectment at the suit of the mortgagee does not plead payment of the mortgage debt, or payments on the mortgage debt is not harmed by the exclusion of evidence of such payments.—*Mills v. Hudmon & Co.*, 448.

MUNICIPAL CORPORATIONS.

1. Defective Streets Causing Injury.

Municipal Corporation; Defective Street; Action; Complaint.—Where the action was against the city for the death of a child caused by permitting water to flow along a street in such quantity, and with such force as to carry the deceased into the mouth of a sewer pipe negligently left open, an averment in the complaint that the city negligently allowed the street to become in a dangerous condition, was a sufficient allegation of implied or constructive notice thereof to the city authorities.—*City of B'ham v. Crane*, 90.

Same; Defenses; Plan.—Where the action was against a city for the death of a child caused by the negligence of the city in permitting water to flow into the street in such quantities, and with such force as to sweep decedent into the mouth of a sewer left open, the city cannot escape liability on the ground that the accident was the result of a defective sewer plan, where it appeared that there was a palpable lack of skill in constructing the sewer, which should have been appreciated by men of ordinary understanding, or where its unsuitability had been demonstrated by previous experience.—*Ib.* 90.

Same; Duty of Corporation.—While the municipality is not bound to provide an underground sewer system, yet, having undertaken to provide such a system, it becomes its duty to see that a proper one is provided which will not leave the street in a dangerous condition.—*Ib.* 90.

Same; Evidence.—Where the action was against a city for the death of a child caused by a defective sewer, it was not competent to show that other well regulated cities followed the same plan in constructing sewers.—*Ib.* 90.

Same; Parties.—Where the action was begun against the mayor and aldermen of the municipality, and pending the suit and before judgment, section 1046, Code 1907, was enacted, judgment was properly rendered against the defendant, as named in the complaint, under the provisions of section 1050, Code 1907.—*Ib.* 90.

2. Vacating Streets and Incidents.

Municipal Corporation; Streets; Vacation.—Local Acts 1907, pp. 644-5, vacating certain streets and alleys in Birmingham on which the defendant railroad company had constructed its freight depot, do not evince a legislative intent to confirm or ratify the obstruction of the streets designated before the vacation thereof was accomplished by the Local Acts, and therefore, did not have the effect of taking away the right of property owners to recover damages for a nuisance arising out of such obstruction prior to the passage of said act.—*Duy v. Ala. Western Ry. Co.*, 162.

Same; Legislative Powers.—The state's power is plenary in respect to the vacation of streets and highways within its borders, except as restricted by the Constitution, and hence, Local Acts 1907, p. 644, is constitutional.—*Ib.* 162.

Same; Constitutional Limitation.—Section 23, Constitution 1901, is the sole restraint on the state's power to vacate streets and highways within its borders; section 235, Constitution 1901, applies only to municipal and other corporations and individuals invested with the right to take property for public use.—*Ib.* 162.

Same; Right of Abutting Owners.—Where an adjoining property owner sought to recover damages for the obstruction of a highway by the defendant in constructing a freight depot across the same, and alleged that by reason of the obstruction his property was

MUNICIPAL CORPORATIONS—Continued.

rendered less accessible, its prominence minimized, and the public use of the street on which it abutted deflected, lessening its value, he alleged a special injury different in kind from that suffered by the general public for which he was entitled to recover damages.—*Ib.* 162.

3. Ordinances and Incidents.

Municipal Corporations; Ordinances; Implied Repeal.—Birmingham Ordinance No. 181, providing punishment for any person guilty of a misdemeanor declared to be such by the state law, which ordinance was passed in accordance with the powers conferred by the city charter under Local Acts, both of which gave the city that power, was not repealed by section 1251, Code 1907.—*S. S. S. & I. Co. v. Smith*, 260.

Same; Charter.—A change in a charter of a municipal corporation does not affect existing ordinances in harmony with the new provisions.—*Ib.* 260.

Same; Instructions.—The judicial inclination is to sustain the validity of ordinances, and in determining their validity, a reasonable construction will be given them.—*Ib.* 260.

Same.—A penal ordinance must be strictly construed.—*Ib.* 260.

Same; Adoption by Reference.—Municipal ordinances being construed by the same rule as statutes, an ordinance may by reference adopt the provisions of statutes or other ordinances.—*Ib.* 260.

Same; Validity.—Since all persons are bound by the criminal statutes of the state, a municipal ordinance providing that any person found guilty of a misdemeanor under the state statute shall be punished therefor, is not invalid for indefiniteness and uncertainty.—*Ib.* 260.

Same.—Where a municipal ordinance provides that any person guilty of a misdemeanor under the state laws should be punished, the fact that there were state misdemeanor statutes inapplicable to the exercise of municipal authority, would not render the ordinance void, but it would be valid as to those misdemeanors over which the municipality had authority.—*Ib.* 260.

4. Officers and Appointment.

Municipal Corporation; Appointment; Officers; Acts Constituting.—Appointment by the governor of a commissioner for a city is not an appointment to a state office within the provisions of section 1474, Code 1907, and hence, does not require a commission. The facts stated and held to constitute a complete appointment without a commission, and that the governor could not thereafter cancel the appointment.—*Draper v. State ex rel. Patillo*, 547.

NEGLIGENCE.**1. Violation of Ordinance.**

Negligence; Violation of Ordinance.—The violation of an ordinance is negligence per se, and entitles one to damages who has been injured in person or estate as a proximate result thereof.—*Watts v. Mtg. Tract. Co.*, 102.

Same; Contributory Negligence.—Where the plaintiff violates an ordinance, it may be contributory negligence if it proximately contributed to the injury, provided the ordinance was enacted for the defendant's benefit, and not merely for the public generally, or for a class.—*Ib.* 102.

NEGLIGENCE—Continued.**2. Issue and Proof.**

Negligence; Issue and Proof.—While a general allegation of negligence in the complaint is sufficient, the evidence to sustain the same must tend to prove definite acts or omission amounting to negligence for which defendant is accountable, at least *prima facie*.—*Ala. C. C. & I. Co. v. Coucden*, 108.

3. Wanton Injury.

Negligence; Wanton Injury.—Where an act is done or omitted under circumstances and conditions known to the person that his conduct is likely to, or will probably result in injury, and through reckless indifference to the consequences, or consciously or intentionally, he does the wrongful act or omits an act which he ought to have done, the injury inflicted is wanton.—*B. R., L. & P. Co. v. Drennen*, 338.

NEW TRIAL.**1. Grounds.**

New Trial; Grounds; Excessive Damages.—As the question of damages rests largely in the discretion of the jury in personal injury actions a trial court will not set aside a judgment merely because in its opinion it is excessive or inadequate, and where the trial court has declined to set aside the verdict, the appellate court will not substitute its judgment for that of the trial court and jury unless the amount is so excessive or inadequate as to indicate prejudice, passion, partiality or corruption on the part of the jury.—*Central of Ga. Ry. Co. v. White*, 60.

NUISANCE.

Nuisance; Private Nuisance; Right of Action.—Under section 5198, Code 1907, the owner of property has a right of action where the defendant maintains a nuisance which results in loss of rents on such property.—*Harris v. Randolph L. Co.*, 148.

Same; Damages; Pleading.—A complaint alleging that defendant maintained a planing mill in a residence portion of the city adjacent to plaintiff's residence property and that on account of the unreasonable noise and the dirt and dust deposited on plaintiff's property, she had been unable to rent it advantageously, and had suffered a diminution in rents, states a cause of action for a private nuisance sufficiently definite to be good against a general demurrer.—*Ib.* 148.

Same; Jury Question.—Whether the noises made by a planing mill situated in a residential portion of the city are unreasonable and a nuisance to other property, are questions for the jury.—*Ib.* 148.

Same; Determination of Question.—The fact that a planing mill was erected in a district already used for residence purposes constitutes a material consideration in determining whether it was a nuisance.—*Ib.* 148.

Same; Negligence.—Negligence, or want of ordinary care in the operation of the alleged offensive factory is not ordinarily an element of an actionable nuisance.—*Ib.* 148.

Same.—Where the defendant stored lumber in a building on his land adjacent to plaintiff's residence, thereby endangering plaintiff's property and increasing the insurance rate thereon, plaintiff was not entitled to recover the increased premiums as damages, as the mere storing of lumber is not a nuisance *per se*; to render

NUISANCE—Continued.

a building a nuisance by reason of exposure of other buildings to fire, the hazardous character of the business therein carried on must be unmistakable, and must be shown to be negligently conducted, so that injurious results are probable.—*Ib.* 148.

Same; Damages; Wanton Injury.—A complaint alleging that defendant, having knowledge that a district was used for residential purposes, erected and operated a planing mill therein, wantonly maintained the business and operated it, notwithstanding it had notice of the damage and injury sustained, and although requested to cease the operation of the business, does not sufficiently show wanton injury.—*Ib.* 148.

Same.—A complaint alleging that defendant maintained a lumber mill in a residence portion of a city adjacent to plaintiff's property, and that it negligently and wrongfully caused noise, dust, smoke, and soot to fall, go upon and be on the property of the plaintiff in such volume as to materially discomfort plaintiff's tenant and to depreciate the renting value of plaintiff's property, states a cause of action for the nuisance of smoke, dust and soot; the averments that they were negligently and wrongfully sent upon plaintiff's premises does not relieve the nuisance of its tortious character.—*Ib.* 148.

Nuisance; Public Nuisance; Obstruction of Street; Special Injury.—One who suffers in person or property special peculiar injury, different in kind from that suffered by the general public on account of a public nuisance may recover damages therefor against the creator of the nuisance.—*Duy v. Ala. Western Ry. Co.*, 162.

OFFICERS.

See Municipal Corporations, § 4.

ORDINANCE.

See Municipal Corporations; Negligence.

PARTIES.

See Pleadings.

Parties; Joinder; Contracts.—Where the contract alleged was that the defendant had agreed with plaintiff and another, to place a stable rented to them in first class repair, and that by reason of defendant's failure to repair a horse of plaintiff was seriously injured, etc., the complaint was demurrable for a failure to join, the co-contracting party as a party plaintiff.—*Jones v. Adler*, 80.

PHYSICIANS AND SURGEONS.

See Hospitals.

1. Civil Liability.

Physician and Surgeon; Civil Liability; Care and Skill Required.—A physician is civilly liable for injuries caused by a failure to exercise such reasonable care and skill as physicians in the same general neighborhood, and in the same general practice ordinarily exercised in like cases.—*Robinson v. Croticell*, 194.

Same.—Although a patient had a temperamental or physical weakness which could not be foreseen and which contributed to the failure of an operation performed by a physician sued for malpractice, the physician was liable if he contributed to plaintiff's injury by a failure to exercise due care and skill or by performing on the a serious operation without his knowledge or consent.—*Ib.* 194.

PHYSICIANS AND SURGEONS—Continued.

Same; Instructions.—In an action against a physician for malpractice, a charge asserting that no matter how skillful a physician may be, he is responsible for his negligence, if any, merely states the proposition that no degree of skill on the part of the physician will relieve him of the responsibility for the consequences of a tortious failure to exercise such skill, and is not objectionable as holding the physician responsible for his negligence, without limiting the responsibility to the proximate result of such negligence.—*Ib.* 194.

Same.—In an action for malpractice, an instruction that a physician is bound to give his patient the benefit of his best judgment, but is not liable for an error of judgment, is properly refused as failing to require any skill of the physician.—*Ib.* 194.

Same.—Where there was no pretense that the physician had by malpractice induced plaintiff's disease, but, except for the disease, plaintiff would not have suffered the injurious consequences of an operation performed without his consent or without the exercise of due care, a charge asserting that there could be no recovery for the injuries sustained by plaintiff by reason of the disease with which he was afflicted, was properly refused as misleading.—*Ib.* 194.

Same.—In an action for malpractice a charge which places on plaintiff the burden of proving a certain aspect of his case as a condition to recovery while plaintiff's pleading and evidence proceeded on another and entirely different alternative theory which entitled him to a verdict without reference to the aspect of the case dealt with in the instruction, was properly refused.—*Ib.* 194.

Same; Evidence.—Where the action was for malpractice based on the ground that defendant caused a dangerous operation to be performed on plaintiff after assuring him that the operation would be a mere trifle, and would involve no serious consequence, the evidence examined and held not to support a verdict for plaintiff.—*Ib.* 194.

PLEADINGS.

For pleas in particular actions or crimes see that title.

1. Abatement.

Pleading; Abatement; Form.—A plea in abatement going to the formation of the grand jury which alleges that the trial judge did not draw the grand jury before the last term of the present term of the circuit court adjourned, was unintelligible and properly stricken.—*Parris v. The State*, 1.

Appal and Error; Abatement; Plea; Abandonment.—Where the right to plead in abatement in the justice court had been lost or abandoned, it cannot be revived by an appeal to the circuit court, on which appeal the case is governed by the provisions of section 4720, Code 1907.—*Woolf v. McLaugh*, 299.

2. Demurrer.

Pleading; Demurrer; Effect.—A demurrer to a plea confesses the truth of its allegation.—*Ex parte Spivey*, 43.

Pleading; Demurrer; Scope.—Where a count states a good cause of action for a nuisance, but includes allegations of damages not recoverable, the proper method to reach such defeat is by motion to strike out such allegation, by objection to evidence or requesting instructions, and not by demurrer.—*Harris v. Randolph L. Co.*, 148.

Pleading; Demurrer; Sufficiency.—Where a demurrer is interposed on the ground that certain counts did not allege any facts

PLEADING—Continued.

to show defendant's liability for any trespass by K or A. the demurrer is general and cannot be considered.—*Cooper v. Slaughter*, 211.

Pleading; Demurrer; Good in Part; Determination.—Where a replication sets up as an answer to all the pleas collectively the single fact that the plaintiffs were minors at the time of the filing of the suit, there was no error in sustaining demurrs to such replication if, in fact, it is not a good defense to each and all of the special pleas.—*Richardson v. Mertins*, 309.

Pleading; Demurrs; Admision.—A demurrer to a rejoinder admits the facts therein alleged.—*Bluthenthal & Bickart v. Columbia*, 398.

Pleading; Demurrer; Rejoinder.—The fact that a rejoinder contains the same defense set up in the plea does not render it subject to demurrer.—*John Deere P. Co. v. City Hdw Co.*, 507.

Same; Demurser; Identity of Contract.—The question whether the clause of a contract pleaded is an exact copy of the clause in the contract cannot be inquired into on demurrer.—*Ib.* 507.

3. Conclusions.

Pleading; Conclusion; Contributory Negligence.—Where the action was for injury to plaintiff caused by falling down an elevator shaft, and the complaint alleged the existence of a dangerous opening, and the failure of the defendant to warn plaintiff of the existence thereof, to guard the opening, and to keep the premises in a reasonably safe condition, a plea alleging that plaintiff proximately contributed to the injury, in that he negligently stepped into the opening causing the injury, was a conclusion of the pleader. and subject to denurrer on that ground.—*Evans v. Ala.-Ga. Syrup Co.*, 85.

4. Amendment.

Pleading; Amendment; New Cause of Action.—Section 5329 and 5367, Code 1907, did not change the law existing theretofore that an amendment could be had where it did not change the form of the action, make an entire change of parties, or introduce an entirely new cause of action; hence, where the original complaint sought damages for placing a permanent obstruction across the street in front of a lot, describing it, and the amendment offered merely changed the description of the lot and charged the same injury, it should have been allowed, although it described a totally different lot.—*Baranco v. B'ham Tern. Co.*, 146.

Pleading; Amendment; New Cause of Action.—Where the complaint set out that an alleged prosecution was commenced before K., clerk of the county court, and there was no showing made that the causes of action were the same, it was proper to disallow a proposed amendment setting up a prosecution for a similar crime instituted before O., a justice of the peace.—*Hanchey v. Brunson*, 236.

PRINCIPAL AND AGENT.**1. Acts of Agent.**

Principal and Agent; Trespass; Complaint.—The rule being that what one does by another he does by himself, allegations that defendant committed trespass through their servants, agents or employees, are sufficient under counts claiming for the common law trespass, or the statutory penalty for cutting trees.—*Cooper v. Slaughter*, 211.

PUBLIC DOMAIN.

Public Lands; Statutes; Constitutionality.—Acts 1878-9, p. 198, to regulate sales of swamp and overflow lands and validating purported sales thereof is constitutional.—*Brannan v. Henry*, 454.

RAILROADS.

1. Trespassers.

(a) Duty to.

Railroads; Trespassers; Duty Owed.—A railway company owes the duty to a trespasser not to willfully or wantonly injure him, or not negligently to do so, after discovering his peril.—*Rice v. So. Ry. Co.*, 69.

Same; Pleading; Complaint.—A complaint alleging that defendant through its agents or servants so negligently operated one of its train that it caused the death of plaintiff's intestate, without alleging the relation or the condition or circumstances surrounding the accident, fails to disclose that plaintiff's intestate was not a trespasser.—*Ib.* 69.

2. Frightening Animals.

(a) Complaint.

Railroads; Frightening Animal; Complaint.—Where the action was for injury to plaintiff caused by his mule becoming frightened by a locomotive operated by defendant near a public highway on which plaintiff was driving, a complaint alleging that defendant's servants in control of the train caused the engine to make such great oft-repeated and long continued noise that the mule was caused to get beyond plaintiff's control, and run away, and that the mule was frightened by reason and as a proximate consequence of the defendant's negligence in that it caused negligently or negligently allowed its engine to make or continue to make great and unnecessary noises while near a highway, was not demurrable, since, as a count must be construed as an entirety, it charged as negligence, the causing or allowing of the locomotive to make or continue to make great and unnecessary noises, which caused the mule to become frightened.—*Ala. C. C. & I. Co. v. Cowden*, 108.

Same; Negligence.—Where the action was for injury caused by the frightening of the mule by noises made by defendant's locomotive near a highway, proof of mere want of necessity without more, for the noises was not sufficient to show negligence, as railroad companies are entitled to make all usual noises incident to the operation of their train, and negligence cannot be predicated upon such noises unless they were unnecessary, and the noises or the movement of the train were recklessly or wantonly made or done after discovery of plaintiff's peril, or were made or done with the intention of frightening the animal.—*Ib.* 108.

(b) Instructions.

Same; Instructions.—A charge asserting that if the jury believe that the mule was frightened by the whistle, and that the whistle was blown in a careful and proper manner, and that plaintiff was not willfully, wantonly or intentionally injured, the jury must find for defendant, was properly refused, since while the manner in which the whistle was blown may have been careful and proper, yet the blowing thereof under the circumstances may have been wantonly done or done after becoming aware of plaintiff's peril.—*Ala. C. C. & I. Co. v. Cowden*, 108.

RAILROADS—Continued.

Same.—Where there was evidence that the injury resulted primarily from the fright of the mule which was produced by the noises, and not necessarily as the immediate and direct result of any wanton, willful, intentional misconduct on the part of the operator of the locomotive, such an instruction was misleading, in so far as it hypothesized that plaintiff was not willfully, wantonly or intentionally injured.—*Ib.* 108.

(c) **Damages.**

Same; Damages.—A charge asserting that if the jury is reasonably satisfied from the evidence that the whistling was done with a wanton disregard of plaintiff's rights, and with knowledge of the situation, and that to blow the whistle and continue to blow would result in injury to plaintiff, then the jury might inflict punitive damages had for its topic the basis or condition on which punitive damages might be imposed, and not the causal connection between the acts hypothesized and the result of which plaintiff complained, and hence, was not objectionable as omitting to hypothesize that the acts enumerated proximately caused the injury and damage complained of.—*Ala. C. C. & I. Co. v. Cowden*, 108.

Same; Punitive Damages.—Where the operatives of a railroad locomotive continue to sound a whistle after they discover that the noise is frightening the animal being driven along a nearby highway, and that the animal is getting beyond the driver's control, such an act is a wanton disregard of the driver's safety, and will authorize the imposition of exemplary damages for injuries caused thereby.—*Ib.* 108.

REASONABLE DOUBT.

See Charge of Court, § 1.

SALES.

See Contracts.

1. **Construction.**

Sales; Contracts; Construction.—All the provisions of a contract of sale must be construed together.—*John Deere P. Co. v. City H. Co.*, 507.

Same; Title and Possession.—The clause printed on the back and the clause printed on the face of the contract considered and it is held that the clause on the face of the contract modified the clause printed on the back of the contract, and together they constituted an agreement that the goods sold under the contract were to remain in the possession of the buyer until October 1, 1910, at which time the seller was to elect whether it would receive the buyer's note for them, or have them shipped back to it; hence, until the happening of that event or that time the seller had no right to sue for their possession.—*Ib.* 507.

Same; Conditional Sales; Recovery; Contract.—Where the action was detinue to recover goods delivered by plaintiff to defendant under a contract reserving title in plaintiff to the goods until payment of the price, and defendant by its pleas admitted that the goods were sold under such contract, but set up certain provisions of the contract, limiting operation of the clause reserving title, it was not necessary that defendant, in its rejoinder, should deny the contract or deny that the good were sold thereunder.—*Ib.* 509.

Sales; Conditional Contract; Retaking Possession; Time.—Several clauses of the contract bearing on time and terms considered, and it is held that under it the seller's right to resume pos-

SALES—Continued.

session was limited by the provision extending credit to October 1, 1910, and that the seller could not enforce his right to retake the property prior to that date.—*Ib.* 512.

SELF-DEFENSE.

See *Homicide*, § 2a.

STATUTES.

See *Constitutional Law*.

1. Retroactive Effect.

Statute; Retroactive Operation.—Unless the Legislature expresses a clear intention to give an act a retroactive operation, the courts will not construe the statutes so as to control or affect past matters or transactions.—*Duy v. Ala. Western Ry. Co.*, 162.

Statutes; Retro-active; Affecting Remedy.—Statutes which merely relate to the remedy, without affecting the right of action, are retro-active, and affect existing causes of action, as well as those subsequently accruing; hence, section 3351, Code 1907. (enacted in 1907) would apply in an action commenced in 1904, and tried in 1910.—*B'ham T. & S. Co. v. Curry*, 373.

Same; Retroactive Laws.—Acts 1911, p. 192, is not, in its application to cases arising prior to its passing violative of section 96, Constitution 1901; while ex post facto laws are prohibited, the rule is otherwise as to changes in the rules of evidence which pertain only to the remedy and not to the right.—*Brannan v. Henry*, 454.

2. Construction.

Statutes; Construction; Validity.—If there is reasonable doubt as to the validity of the statute the doubt should be resolved in favor of its validity.—*C. of Ga. Ry. Co. v. Groesbeck*, 189.

Statutes; Construction; Re-enactment After.—Where a statute has been judicially construed, and is re-enacted without modification, the re-enactment adopts the construction previously given the statute, and it must receive the same construction.—*Bruce v. Sierra*, 517.

3. Curative Acts.

Same; Power of Legislature; Curative Acts.—The legislature has the power to pass curative acts giving effect to defective conveyances of public lands.—*Brannan v. Henry*, 454.

3. Title.

Statutes; Title.—The provision giving a *prima facie* evidential effect to documents found in Acts 1911, p. 192, does not render the act violative of section 45, Constitution 1901.—*Brannan v. Henry*, 454.

5. Enactment.

Statutes; Enactment; Approved by Governor; Failure; Adjournment.—The constitutional provision that if any bill shall not be returned by the Governor within six days after it shall be presented to him, it shall become a law as if he had signed it, unless the legislature, by its adjournment, prevents its return, has in view a final adjournment and not a mere recess.—*State ex rel. Crenshaw v. Joseph*, 579.

Same; Failure to Return.—The time within which the Governor may consider a bill without its becoming a law is measured by calendar days under the constitutional provision that a bill shall become a law, as if signed by the governor, if it shall not be re-

STATUTES.—Continued.

turned by him within six days after presented, Sundays excepted.—*Ib.* 579.

Same.—Under the constitutional provision above referred to the return of the bill contemplates a return while the House is in session, and it cannot be returned to any officer or aggregation of members of the House when not in session.—*Ib.* 579.

Same.—Where a return of the bill by the governor to the House in which it originated is prevented by recess for more than a day, the two days after re-assembling in which it must be returned to the House under the Constitution to prevent it becoming a law without signature, must necessarily be legislative days.—*Ib.* 579.

Same; Approval by Governor; Evidence.—A memorandum made on a bill at the time by the Governor's recording secretary cannot be resorted to to show when a House bill reached the Governor, which was returned with objections to the House by the Governor, in order to determine whether it was so returned in six days as required by the Constitution; as the legislative record, with amendments to obviate the Governor's objection, and the presumptions therefrom in favor of its constitutional enactment are conclusive. Hence, where the legislative record and journals did not, and were not required to show when the bill was presented to the Governor, such memorandum was not admissible to show that the bill was not returned within six days.—*Ib.* 579.

STREET RAILWAYS.**1. Injury to Pedestrians.****(a) Complaints and Pleas.**

Street Railways; Injury to Pedestrian; Pleading; Negligence.—In an action for injuries for being struck and injured by a street car while crossing a public street, a count in the complaint which alleges the injuries to have been caused by the negligence of the defendant in the negligent manner in which it ran or operated its car sufficiently charges negligence to be good against demurrer, although the charge is inferential and not categorical.—*B'ham Ry., L. & P. Co. v. Bush*, 49.

Same.—When it is necessary to exercise due care, a failure to do so is negligence, and hence, a count alleging that plaintiff's said injuries were proximately caused by the negligence of defendant's motorman in charge of the operation of said car, while acting within the line and scope of his employment, in failing to exercise due care after discovery of plaintiff's peril, states a situation in which the defendant owed the plaintiff the duty of diligence, even though plaintiff had negligently gone on the track, and is a sufficient statement of negligence, though it does not aver that the motorman negligently failed to use due care.—*Ib.* 49.

Same; Pleading; Contributory Negligence.—Where the action was for injuries received by being struck by a car, a plea setting up plaintiff's contributory negligence proximately contributing to her alleged injury which consisted in her going upon and remaining on or dangerously near the railroad track of the defendant in front of or dangerously near to a car then and there approaching on said track, while good as against a count in simple negligence, is not good against wanton counts, or a count charging a failure of the defendant's motorman to use due care after discovery of peril.—*Ib.* 49.

(b) Instructions.

Same; Instructions.—Where, under the evidence, it was a question for the jury to determine whether plaintiff was permanently

STREET RAILWAYS—Continued.

injured and if so, how far in the future such injuries would affect her earning capacity, the court properly denied a charge asserting that if the jury believed the evidence, they could not award plaintiff any damages for decreased earning capacity; such charge was also improper as pretermittting the right of plaintiff to recover nominal damages on that issue.—*B'ham Ry., L. & P. Co. v. Bush*, 49.

Same; Instructions.—Where a complaint stated two causes of action in different counts, against a street car company for the death of a traveller, one counting on simple negligence, and the other on wanton negligence, a charge that if the jury are reasonably satisfied that either one or the other counts was true plaintiff's case was made out, was not objectionable as directing a verdict for the plaintiff, or as ignoring pleas of contributory negligence.—*B'ham R., L. & P. Co. v. Drennen*, 338.

Same; Instructions; Form.—Where the action was for death in a collision between decedent's carriage and a street car, a charge asserting that if the decedent pulled his horses on the track, and was guilty of contributory negligence in that regard, yet if the motorman saw the peril in time to have avoided injury by the exercise of due care, and negligently failed, after discovering the peril, to do what he could, in the exercise of due care in managing the car, and such negligence, if any, proximately caused the death, then decedent's negligence, if any, in getting into danger, would be no defense to the subsequent negligence of the motorman, even if the motorman was not guilty of wanton nor intentional wrong, was neither abstract, nor misleading.—*Ib.* 338.

(c) Contributory Negligence.

Street Railways; Collision Accident; Contributory Negligence.—As the ordinance requiring vehicle drivers to keep to the right of the center of the street was not enacted for the benefit of a street car company, though their tracks be in the center of the street, such street car company is not in position to plead contributory negligence on account of the owner being in the center of the street contrary to the ordinance, when sued for damages to an automobile, caused by one of its cars striking it.—*Watts v. Mtg. Tract. Co.*, 102.

Same.—The driver of an automobile running ahead of a street car was not guilty of contributory negligence in failing to signal the motorman to stop unless such driver knew that the car was approaching.—*Ib.* 102.

(d) Evidence.

Same; Accident; Evidence.—Where the evidence showed that the automobile was being run astride the south rail of the street car track which was twelve feet from the south curb, while the north rail was fifteen feet from the north curb, the automobile was on the right hand side of the center of the street, and an ordinance requiring vehicle drivers to keep to the right of the center of the street became irrelevant and immaterial.—*Watts v. Mtg. Tract. Co.*, 102.

(e) Wanton Injury.

Street Railways; Injury to Traveller; Collision; Wanton Injury.—The evidence in this case examined and held to require submission to the jury of the issues of wanton negligence, negligence and contributory negligence.—*B'ham Ry., L. & Po. Co. v. Drennen*, 338.

SUPERSEDEAS.

See Appeal and Error, § 3c.

Appeal and Error; Supersedeas; Curing Defects.—On appeal, the defects in a supersedeas bond cannot be cured, but the defects therein should have been remedied in the trial court.—*B'ham T. & S. Co. v. Curry*, 373.

TAXATION.

Taxation; Assessment; Right of State to Appeal.—Section 2252. Code 1907, was repealed by Acts 1911, p. 159, and hence, the state cannot appeal from an order of the Commissioner's Court fixing the value of property for taxation.—*State v. Ide Cotton Mills*, 539.

Same; Legislative Power.—The legislature has power to authorize an appeal by taxpayers from assessments of their property for taxation, and to deny right of appeal to the state.—*Ib.* 539.

TRANSCRIPT.

Filing, etc., see *Appeal and Error, § 2.*

TRESPASS.

See Courts, § 2; Venue.

1. Personal Property.

Trespass; Personal Property; Complaint.—A complaint which alleged that plaintiff claimed of defendant a specific sum as damages for wrongfully taking the following goods and chattels, the property of plaintiff, to-wit, 3,000 pine rails and 3,000 pine boards, stated a cause of action for trespass to personal property, and is not demarable for failing to allege the time of the trespass.—*Miller-B. L. Co. v. Lunday*, 160.

Trespass; Plea; Uncertainty.—As a defense to an action of trespass for wrongfully taking a stock of goods, plea 3 examined and held insufficient as being confusing in effect, and for failure to describe with sufficient certainty the action set up in justification; such plea was also insufficient for failing to show that the writ of attachment set out therein was ever returned.—*So. C. O. Co. v. Harris*, 323.

Same; Justification.—As an answer to an action of trespass for wrongfully taking a stock of goods, a plea attempting to show that the goods were taken under an attachment and sold to satisfy a judgment entered in favor of defendant is insufficient where it neither shows under what process the property was sold, nor whether there was any order or process authorizing the sheriff to sell the same, nor that any process was ever returned into court.—*Ib.* 323.

Same.—An attachment will not sustain a plea of justification under process in trespass for the wrongful taking of the goods, where the record of the proceedings under which the justification is claimed shows that the levy was quashed under claim of exemption.—*Ib.* 323.

Same; Evidence.—Where the defendant justified on the ground of a fraudulent sale to plaintiff, and an attachment, and plaintiff was in business for himself, whether he received any part of his stock from his wife was immaterial as not tending to show that he was without means to purchase the stock alleged to have been wrongfully taken.—*Ib.* 323.

Same; Identification of Subject-Matter; Instruction.—Where the action was in trespass for the wrongful taking of a stock of goods, a charge asserting that if the jury believe that at the time

TRESPASS—Continued.

plaintiff purchased the goods, the subject of this suit, one R. owed him a bona fide debt in satisfaction of which plaintiff purchased said stock of goods, they should find for plaintiff sufficiently shows that the goods were those purchased by plaintiff from R., especially where the whole subject of the litigation was as to the validity of that sale, even though defendants claimed that all of plaintiff's goods were liable to the levy of the attachment, by reason of a wrongful intermingling.—*Ib.* 323.

2. Realty.

Trespass; Reversal; Trespass After Warning.—Under section 4756, an entry to remove a building under the sale, which entry was accomplished in a reasonable manner, and with due regards to the rights of the occupant cannot be considered a violation of the criminal statute denouncing trespass after warning, nor will the subsequent reversal of the judgment giving the lien relate back so as to make the entry a trespass, where such judgment had not been superseded on appeal.—*Wildman v. Evans Bros. Const. Co.*, 333.

TRIAL.**1. Objections to Evidence.**

Trial; Objection to Evidence; Mode.—Where the warrant was introduced in evidence without objection, it should have been excluded on motion if shown not to be genuine or correct, but was not subject to objection to its introduction.—*Adams v. The State*, 8.

Trial; Reception of Evidence; Conditional Objection.—Where a party objected to evidence unless other facts are shown, this is a conditional objection and will not support error.—*Cooper v. Slaughter*, 211.

Same; Discretion of Court.—The acceptance or rejection of evidence not strictly in rebuttal is within the sound discretion of the trial court.—*Ib.* 211.

Same; Statement of Ground.—The statement of one or more grounds of objection to evidence is a waiver of all other grounds not stated.—*Ib.* 211.

Trial; Objection to Evidence; Necessity.—Where a witness who was a lawyer, but who did not qualify as an expert, testified that the will was properly executed, and no objection was made to the testimony on the ground that it was a mere conclusion, and the facts on which he based his opinion were not elicited, the testimony could not be excluded on a general objection.—*Bruce v. Sierra*, 517.

2. Exclusion of Evidence.

Trial; Exclusion of Evidence; Admission in Part.—Where parts of the evidence was clearly admissible, a motion to exclude the evidence of the witness not designating the objectionable part, was not sufficient.—*Ala. Chem. Co. v. Phelps*, 121.

3. Order of Proof.

Trial; Order of Proof.—Where the action was for trespass for taking a stock of goods, a statement by defendant's counsel that he proposed to show that the plaintiff married stock of goods, and continued in business, was properly excluded as unintelligible.—*South. C. O. Co. v. Harris*, 323.

4. Argument of Counsel.

Appeal and Error; Harmless Error; Misconduct of Counsel.—Where plaintiff's counsel, in arguing the case, referring to defendant's counsel said: "I know Hugh Morrow, and I know what I am

TRESPASS—Continued.

going to say about him is true. I know that if he was on the jury trying this case, that he would render a verdict for the plaintiff in a large amount." Defendant's counsel objected and objection was sustained, but the court did not exclude the argument or reprimand counsel for using it, nor did defendant's counsel further move the court to exclude, but assigned the same as grounds for new trial. Held, that the argument was prejudicially erroneous, and that the court having failed to more forcibly exclude the same and reprimand counsel, should have granted defendant a new trial on account of same.—*B'ham Ry., L. & P. Co. v. Drennen*, 388.

5. Introduction and Reception of Evidence.

Trial; Introduction of Evidence.—A general objection to the introduction of the record of a mortgage, the original of which had been introduced in evidence, was not sufficient.—*Mills v. Hudmon & Co.*, 448.

Same.—Where a witness testified that he bought the land in for the plaintiff at the mortgage foreclosure sale, the evidence was competent and the objection that it was in writing or else void was inapt.—*Ib.* 448.

VENDOR AND PURCHASER.

Vendor and Purchaser; Bona Fide Purchaser; Constructive Notice.—The possession of real estate by a purchaser under an unrecorded deed is constructive notice only when its possession is open, notorious and exclusive, and possession jointly with the vendor is not such notice.—*Christopher v. Curtis-A. L. Co.*, 484.

Same.—A prior possession, which has been terminated before the acquisition by a second purchaser of his rights, is not constructive notice to the second purchaser, though such prior possession, when actually known to the second purchaser may show actual notice to the antecedent claimant, in connection with other evidence.—*Ib.* 484.

Same.—A purchaser of land from a vendor in possession, is not chargeable with constructive notice of the rights of a third person who had previously purchased from the vendor the standing timber on the land, but had never been put in possession, and had merely cut and hauled away timber at intervals.—*Ib.* 484.

Same; Actual Notice.—A purchaser of land in possession of the vendor with notice of the cutting and removal of timber thereon by a third person does not have notice that the cutting and removal is under a contract of purchase of the standing timber, unless the facts reasonably impress the mind of a reasonable man that the cutting and removal by the third person was as owner and not merely by permission of the vendor.—*Ib.* 484.

Same; Notice; Evidence.—Where the issue was whether the defendant had notice of the sale of the timber, the action being ejectment by a purchaser of standing timber against a subsequent purchaser of the land from the vendor in possession, evidence of plaintiff's entry on the land and cutting timber therefrom during three months before the sale to defendant was not admissible in the absence of evidence of defendant's knowledge thereof.—*Ib.* 484.

Same.—As against a prior purchaser of the standing timber a purchaser of the land was entitled to show that the land including the timber was not worth more than the price paid in order to show his good faith in the purchase of the lands with the timber.—*Ib.* 484.

VENUE.

Venue; Trespass; Waiver of Objection.—Where a party neglects to assert his rights within a reasonable time, having cause to set aside any process or proceeding, he waives the objection by such neglect, and the provisions of section 6110, Code 1907, fall within this rule.—*Woolf v. McGaugh*, 299.

WATER AND WATERCOURSES.

1. Changing Flow.

Waters and Water Courses; Diversion; Surface Water; Evidence.—The evidence stated and held insufficient to sustain counts charging wrongful diversion of a stream from its natural course, causing it to flow over and across plaintiff's land, or that the flow of surface water has been changed.—*Killian v. Killian*, 224.

Same; Injury to Servient Tenement.—The evidence examined and held insufficient to sustain a count charging injury to a spring and water, and to plaintiff's farm.—*Ib.* 224.

Same; Pollution.—A landholder may not place anything in either percolating water or that which is gathered in defined and known surface streams which will pollute the wells or springs of his neighbor.—*Ib.* 224.

Same; Drainage.—An upper landowner may drain and ditch his land provided he does so with a prudent regard for the welfare of lower owners, and that he does no more than concentrate the water and cause it to flow more rapidly and in greater volume on the inferior heritage, and it is usually a question for the jury whether the use made was reasonable.—*Ib.* 224.

Same.—In an action for deflecting water into a sinkhole whence it flowed by underground channels into plaintiff's spring, it was a question for the jury whether the disposition of the water by the defendant was a prudent and proper one to protect his own property, and whether it was with a proper regard to the interest of plaintiff, a lower owner.—*Ib.* 224.

Same; Natural Channel; What Constitutes.—The fact that water flows naturally through a channel will not make it a known and well defined channel.—*Ib.* 224.

Same; Pollution; Acts of Dominant Owners.—To render an upper owner liable to the lower owner for pollution of a spring by diverting waters into a sinkhole, it must be shown that the water falling into the hole passed through the spring, and that the water would not pass into the sinkhole but for the acts of such upper owner.—*Ib.* 224.

Same; Burden of Proof.—The burden of showing that the spring was damaged by the act or agency of the upper owner is upon the lower owner suing for such pollution.—*Ib.* 224.

Same; Action; Parties.—Where the defendant neither owned any interest in the land on which the sink hole was located, in which the waters were claimed to have been diverted, nor directed nor authorized the act in question, no recovery can be had against him for diverting surface water and polluting a spring.—*Ib.* 224.

Same; Instructions.—Whether or not the defendant, an upper owner, knew that the water diverted would flow into plaintiff's spring was for the jury in determining whether the disposition of the water was prudent and with due regard to the interest of the plaintiff, and an instruction asserting that a lack of knowledge would not relieve the defendant from liability was misleading.—*Ib.* 224.

Same.—Where the action was for deflection of surface water into a sink hole, causing injury to plaintiff's spring, an instruction

WATER AND WATERCOURSES—Continued. A claim to land, asserting that in law a known and well-defined channel is a channel through which water naturally flows, was abstract.—*Ib.* 224.

WILLS.

Wills; Revocation; Instrument Revoking.—Under sections 6172 and 6174, Code 1907, an instrument revoking a will to be operative must be signed by the testator or someone for him, attested by at least two witnesses, who must subscribe their names in the presence of the testator.—*Bruce v. Sierra*, 517.

Same.—Under section 6174, a subsequent will legally executed revokes a prior will without any proof of the contents of the will.—*Ib.* 517.

Wills; Construction; Administration.—Where the bill was to remove an administration from the probate to the chancery court, and to construe a will, and the bill contained a copy of the will and pointed out various matters in the will with reference to which doubt and uncertainty has arisen and sought the aid of equity to construe the will, and to direct the executors in the premises, the bill was not demurrable for want of equity.—*Spiers, et al. v. Zeigler*, 684.

WITNESSES.

1. Impeachment.

Witnesses; Impeachment; Testimony of Accused.—Where a defendant testified in his own behalf he was subject to impeachment by proof that his general moral character was bad.—*Parris v. The State*, 1.

Same; Weakening Testimony.—Where two witnesses both detailed circumstances in regard to a killing it was permissible for the purpose of weakening their testimony to show that they were drinking shortly after the difficulty.—*Ib.* 1.

Witnesses; Impeachment; Necessity for Predicate.—Where no statement was made to the court as to the purpose of the cross-examination of a witness as to statements made by her in her answers to interrogatories propounded before the trial, it was not necessary for the court to inquire whether the purpose of such cross-examination was to contradict and impeach the witness, or to test and refresh their memory, and the court will not be put in error for sustaining objections to the questions.—*B'ham Ry., L. & P. Co. v. Bush*, 49.

Same.—Where it was sought to impeach the testimony of a witness by showing conflicting statements made in answers to interrogatories, the proper and necessary course is to put the answer in the hands of the witness, if they can be had, and ask him whether it is his answers and depositions, and hence, where a witness was simply questioned as to whether or not he had made a conflicting statement, without either showing or an offer made him to show him his deposition, a sufficient predicate for impeachment was not shown.—*Ib.* 49.

2. Examination and Cross.

Witnesses; Examination; Leading Questions.—Whether or not a court will permit leading questions to a witness is within the sound discretion of the trial court.—*Cooper v. Slaughter*, 211.

Witnesses; Examination; Repetition.—Where a witness has stated fully and freely his knowledge of a matter inquired about, the refusal to allow a repetition of his testimony as to that fact is not error.—*Busbee v. Thomas*, 423.

WORK AND LABOR.

Work and Labor; General Issue; Plea.—Where the common count for work and labor done is brought, a plea setting up a breach of a provision of the contract was no answer thereto, and was subject to demurrer, as under such count, and the general issue plaintiff is required to prove either an express contract which he has fully performed or the furnishing of labor and material which were of benefit to the defendant and were voluntarily accepted.—*Montgomery Co. v. Pruett*, 391.

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